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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHICAGO HOUSING AUTHORITY,
PETITIONER

v.

JEROME HUNT,
RESPONDENT

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a local government agency may be liable under 42 U.S.C. § 1983 for discharging an employee in violation of his constitutional rights when the agency's official policies are established by a seven-member Board and (1) the discharge was in contravention of official agency policy, (2) the termination was approved by only one member of the Board, and (3) the other six Board members were not aware of and did not participate in the decision to discharge the employee.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, two former employees of the Chicago Housing Authority, James Gilmartin and Charles Clarke, were defendants-appellants in the court below. They are not petitioners in this Court because the court of appeals reversed the judgments against them. Another former CHA employee, Winston Moore, received a favorable jury verdict at trial and was not a party in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Chicago Housing Authority ("CHA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (App. A, *infra*, 1a-26a) is unreported, but the court's ruling is listed in the table of decisions appearing at 972 F.2d 351, and the text of the court's opinion is available on both Westlaw (Allfeds database) and Lexis (1992 U.S. App. LEXIS 20161). The opinion of the district court (App. B, *infra*, 27a-30a) is also unreported, but the text of its opinion is available on Westlaw (1990 WL 133228) and Lexis (1990 U.S. Dist. LEXIS 12025) as well.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1992. A timely petition for rehearing was denied on September 14, 1992. App. C, *infra*, 31a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The text of 42 U.S.C. § 1983 is set forth in Appendix D, *infra*, 32a.

STATEMENT

The CHA is a local government agency that provides public housing for low- and middle-income residents of the City of Chicago. Jerome Hunt, a former CHA employee, sued the CHA and three of its former employees under 42 U.S.C. § 1983 after being discharged from his job, claiming essentially that he was fired for criticizing the elevator service at CHA buildings in violation of his First Amendment rights and his rights to procedural and substantive due process. The three individual defendants all have been exonerated of liability. App., *infra*, 2a n.1, 13a.[1] As for the CHA (the one remaining defendant), the court of appeals held that it was liable because "the CHA was directly responsible for firing Mr. Hunt" in violation of his constitutional rights. *Id.* at 17a.

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[1] In addition to the citations to the Appendix, *infra*, the relevant factual materials will be cited as follows. Documents entered on the district court's docket sheet and contained in the record on appeal will be referred to as "R." followed by the docket number and page number if applicable. The trial transcript will be referred to as "Tr.," and the parties' trial exhibits will be identified as "Pl. Ex." and "Def. Ex."

This Court has emphasized that a local government agency cannot be held liable under § 1983 unless the "officials or governmental bodies who speak with *final policymaking authority* for the local governmental actor" have made decisions which "caused the deprivation of rights at issue by policies which affirmatively command that it occur." *Jett* v. *Dallas Indep. School Dist.*, 491 U.S. 701, 737 (1989) (emphasis added). The CHA's final policymaking body is its Board of Commissioners (App., *infra*, 8a), but the seven-member Board did not fire Hunt; rather, Hunt was fired by lower-level officials "with the approval of" *only one* Board member. *Id.* at 6a. Moreover, the Board had adopted personnel policies that prohibited discharging Hunt in violation of his constitutional rights. Despite the CHA's official policies, and although there was no evidence that the other six Board members even knew that Hunt had been fired (let alone evidence that they participated in that decision), the court below held—without explanation—that the evidence was "sufficient" (*id.* at 26a) to impose liability on the CHA. However, in upholding liability based on the acts of a single Board member, the court of appeals has effectively made a clear end-run around this Court's longstanding prohibition on *respondeat superior* as a basis for municipal liability under § 1983.

1. Hunt's Employment By The CHA. The CHA hired Hunt in 1980 as "resident elevator representative." In that job, Hunt was a member of the CHA Elevator Committee (disbanded in 1981) and worked to improve elevator service in CHA buildings. Hunt often attended the Board's public meetings, where he criticized the maintenance and repair of CHA elevators.[2] App., *infra*, 2a-3a.

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[2] It was well known at the CHA in the early 1980s that there were serious problems with CHA elevators, because the elevator mechanics were doing a poor job and were submitting false records

(Footnote continued on following page)

After Hunt did so at a January 1982 meeting, Andrew Mooney, then the CHA's Executive Director and later the Board's Chairman, told Hunt:

> Mr. Hunt, I would prefer if you did not yell at the board * * *. I'm sorry I'm raising my voice, but I finally have gotten tired of you talking to this board this way. Everyone else who came and approached this board today was treated respectfully, they spoke to the board in an appropriate manner. * * * And I apologize up front for raising my own voice, but there is a point at which the Authority and the respect of this board needs to be treated properly.

Pl. Ex. 53, pp. 32-33. Shortly after this meeting Hunt received a satisfactory evaluation, his probationary status was lifted, and he got a raise. Tr. 96-97, 327-29; Def. Exs. 10, 12; Pl. Ex. 10.

Because he was frustrated with the limited responsibilities that came with his job, Hunt asked the Board repeatedly to end his employment. He did so at Board meetings on May 12, 1981 (Pl. Ex. 51, pp. 33-34), September 8, 1981 (Pl. Ex. 52, pp. 88-89), and January 12, 1982 (Pl. Ex. 53, p. 33). At a Board meeting on November 23, 1982, Hunt said:

> I am paid by y'all, and I am not doing anything. * * * I don't know nothing. I am just being paid. And I wish y'all would do something about that soon.

Pl. Ex. 54, pp. 36, 41. Commissioner Patrick Nash responded by stating that he would "bring it up." *Id.* at

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[2] *continued*
in support of their requests for payment. Tr. 37, 44-45, 51, 71-72, 85-89, 515, 560-64. The CHA initiated several investigations of the mechanics, and two of the individual defendants in this case assisted in a five-part television series that publicized the mechanics' wrongdoing. Tr. 218-19, 717-20, 727-28.

41. When Hunt reiterated his point by saying, "Stop paying me, will you?," Chairman Mooney remarked, "Perhaps that is the best thing to do." *Id.* at 42. Hunt immediately responded, "Well, do it." *Ibid.*

The Board considered Hunt's request to terminate him at its next meeting, an executive session on December 20, 1982. At that meeting, Commissioner Estelle Holzer remembered Hunt as

> the gentleman who said we paid him $25,000 or something a year, and he doesn't do a thing. * * * He was asked what he was supposed to be doing, and he said he was doing nothing, and he received money, and was wishing he could get off rather than receive money.

Pl. Ex. 56, p. 13. Chairman Mooney said that he understood that Hunt "has difficulty accepting supervision," but when asked if he was "moving to fire" Hunt, Mooney replied flatly, "I am not." *Id.* at 15. Commissioner Nash stated that he was "reluctant" to discharge Hunt and that a "revised job description" for Hunt was necessary; since the CHA elevator committee "doesn't exist any more," Hunt's job description "isn't valid anymore." *Id.* at 17.

Commissioner Leon Finney noted initially that, "I have a problem seeing why he would come to a meeting and publicly vent his frustration" (*id.* at 16), but Finney went on to say that

> *I don't think this board ought to get involved in termination or hiring. * * * I don't want to get involved in hiring and firing at this level.* That is the wrong level for us. I think the appropriate thing for us to do is to instruct the Executive Director to take this matter under consideration, to deal with it and get it out of here.

Id. at 17-18 (emphasis added). Because the decision whether to retain Hunt was "an inappropriate matter for

us to wade into," Commissioner Finney proposed to "let the staff handle it." *Id.* at 18, 19. After noting that Hunt's job description had become "obsolete," Finney suggested that Hunt (1) be given an "appropriate job description * * * that is in agreement with the present organizational structure," (2) "be placed under someone's supervision," and (3) "be given a period of time to conform to that job description." *Id.* at 19, 20. Finney concluded by saying that if Hunt "doesn't perform" during that time under a new job description "that is meaningful within the organizational structure," he should then (and only then) "be taken out of the organization" by "follow[ing] the usual personnel procedures."[3] *Id.* at 19, 20. After Commissioner Finney's remarks, Chairman Mooney closed the discussion by summarizing the "consensus" that the Board had reached. *Id.* at 20. First, Executive Director Elmer Beard was directed to "revise the [job] description."[4] *Ibid.* Second, any future decisions about Hunt's job were to be made by Executive Director Beard, and he was given the discretion to "take appropriate action based on that [revised] job description." *Ibid.* In short, the Board's consensus was to give Hunt an opportunity to perform under a revised job description, and Executive Director Beard was given the authority to make future decisions concerning Hunt's job, but was required to "follow the personnel policies." *Ibid.*

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[3] The CHA personnel policies stated that the CHA "shall conform" to federal law (Pl. Ex. 46, § 2001) and explicitly recognized that employees "retain[ed] the privilege of disagreeing with the policies established by the Commissioners" (*id.*, § 2003.4). The personnel policies further provided that "[a]ll policies, policy amendments or additions must be approved by the Commissioners." *Id.*, p. 2. Finally, the Executive Director was given the discretion to "alter procedures" in certain situations, but only if he acted "within the framework of the established policies." *Ibid.*

[4] The Executive Director attended Board meetings, but was not one of the seven Board members. See Pl. Ex. 56, p. 1.

In the next two months, lower-level officials discussed several times whether Hunt should be discharged. On January 19, 1983, the manager at one building, Michael Davis, asked for a hearing concerning Hunt because Hunt had committed "*several* acts of gross insubordination" and had "harass[ed]" Davis's office. Def. Ex. 32. At Mooney's direction, James Gilmartin (the CHA's newly-hired Personnel Director) held the hearing; the attendees were all non-policymakers and included Gilmartin and Davis. Pl. Ex. 29; Tr. 140, 151. Hunt was not informed of the meeting (Tr. 122-23), and it resulted in a decision not to fire Hunt because there was insufficient evidence or documentation supporting Davis's allegations. Tr. 184-85; Pl. Ex. 29. On two subsequent occasions, however, Gilmartin did recommend to Mooney that Hunt be discharged: once for allegedly attending a CHA Board meeting on CHA time, in violation of a CHA rule; and once for coming to work drunk and breaking a window. Mooney did not follow either recommendation. Pl. Exs. 30-31, 34-35; Def. Exs. 16-17; Tr. 105, 129, 591, 596.

2. Hunt's Discharge. In April 1983, Hunt twice failed to return to the office to sign out by 4:30 p.m., as required by CHA policy and as ordered by Charles Clarke, Hunt's supervisor. Pl. Ex. 37; Tr. 131-33, 165, 432-34, 553-54, 606, 616. When Clarke questioned Hunt about it, Hunt called Clarke a "damn liar." Tr. 133, 429-30, 607-08. According to Clarke, Hunt said he did not have to sign out (Pl. Ex. 37); Hunt admitted that he "might have said that" (Tr. 613). As a result of this incident—and because Hunt had "been guilty of gross insubordination on other occasions"—Clarke suspended him without pay, pending an investigation. Pl. Ex. 37; Tr. 307-08.

Clarke recommended Hunt's discharge to Gilmartin, who recommended to Mooney that Hunt be fired. Pl. Ex. 39; Tr. 182-83. Although terminations were "[g]enerally" ap-

proved by "the full board" (Tr. 141), Hunt's termination was not; instead, Mooney and Executive Director Beard (a non-Board member) told Gilmartin—without receiving Board approval—that the two of them "agree[d] with your recommendation." Pl. Ex. 40; Tr. 142. On May 20, 1983, Gilmartin informed Hunt that

> [t]he Chairman has approved the recommendation of your supervisor and the Director of Personnel to terminate your employment because [of] a documented pattern of disciplinary actions taken against you from direct disobedience of a supervisor's directive through gross insubordination and destructive and abusive behavior.

Pl. Ex. 41. There was no evidence that the other six members of the Board knew that Hunt was fired (or even that his discharge had been recommended), much less that they participated in the decision to end his employment.

3. Proceedings Below. Hunt brought suit against the CHA and three of its former employees (Gilmartin, Clarke and Winston Moore).[5] At trial, the jury returned a mixed verdict on Hunt's five claims. On the state law claims for breach of contract and retaliatory discharge, the jury found for all of the defendants. On the First Amendment claim, the jury found against the CHA but ruled in favor of each individual defendant. The jury also found against the CHA and two of the individual defendants on Hunt's procedural and substantive due process claims. R. 319, pp. 2-7. The district court denied the defendants' motion for j.n.o.v. (App., *infra*, 27a-30a) and entered judgment for approximately $195,000 in back pay, $76,000 in prejudgment interest and $22,000 in front pay (*id.* at 30a; R. 341,

[5] Hunt did not sue either Mooney or Beard, the two individuals who approved his termination.

380). The court also awarded nearly $262,000 in attorneys' fees.

On appeal, the Seventh Circuit reversed the judgments against the individual defendants (App., *infra*, 13a), but affirmed the judgment against the CHA. The court acknowledged that Hunt's discharge had the approval of only one member of the seven-member Board of Commissioners, Chairman Mooney (*id.* at 6a), but it held nevertheless that the evidence was sufficient to conclude that "the CHA was directly responsible for firing" Hunt (*id.* at 17a). (To find liability on a direct responsibility theory, the jury was instructed correctly that there must have been evidence that "the board decided to discharge Hunt" in violation of his constitutional rights. Tr. 887, 900, 904.)[6] The

[6] The instructions also listed four other possible bases on which the CHA might be liable on Hunt's constitutional claims—none of which the court of appeals held to be a sufficient basis for affirming the judgment against the CHA. The court held that "[t]here is no realistic possibility that the jury based the CHA's liability" on three of those theories: that the CHA "failed to investigate" Hunt's discharge; that it "approved the discharge"; and that it "delegated its policymaking authority" to the individuals who fired Hunt. App., *infra*, 17a.

The court did not mention a fourth alternative that applied only to the procedural due process claim: that the CHA Board "acquiesced in a longstanding practice or custom of discharging employees without fair process." Tr. 900 (jury instruction). A verdict on that theory could not have been sustained. There was absolutely no evidence that the Board knew that Gilmartin—who joined the CHA as Personnel Director five months before Hunt's discharge (Tr. 188-89; Pl. Ex. 56, pp. 2-11)—generally did not hold pretermination hearings, let alone evidence that the Board acquiesced in such a practice. Moreover, there was no evidence that the number of employees who had not received pretermination hearings, or the length of time during which hearings purportedly did not occur, was great enough to constitute a " 'persistent and widespread' " practice that was " 'so permanent and well settled as to constitute a "custom or usage" with the force of law.' " *Monell* v. *New York City Dep't of Social Services*, 436 U.S.

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court of appeals did not attempt to explain how its *per curiam* decision could be reconciled with this Court's decisions holding that a local government agency can be held liable under § 1983 only if the constitutional deprivation occurred as a result of an official policy adopted by the agency's final policymaking body.

REASONS FOR GRANTING THE PETITION

Ever since *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978), this Court has adhered consistently to the principle that a local government agency cannot be held liable under § 1983 unless the agency's final policymakers committed a constitutional violation that caused plaintiff's injury, or adopted policies that caused the violation. The Seventh Circuit's ruling here effectively evades the rules established in *Monell* and its progeny whenever, as is often the case, an agency's final policymaker is a multi-member body: the court of appeals upheld liability against the CHA even though the act that allegedly violated Hunt's rights—his termination—was approved by only one of the seven members of the CHA's Board of Commissioners. Indeed, there was not a shred of evidence that the other six Board members even knew that Hunt's termination had been recommended or that Hunt had in fact been fired. Moreover, the Board as a whole had adopted specific personnel policies—completely

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[6] *continued*

658, 691 (1978) (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970)). Indeed, there was no evidence that *any* CHA employee other than Hunt was even discharged in 1983, much less that anyone else was improperly denied a pretermination hearing. A single constitutional violation is insufficient to establish that a widespread practice exists. *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 823-24 (1985) (plurality opinion).

ignored by the court of appeals—that required all CHA officials to follow the requirements of federal law in making employment decisions and specifically recognized employees' rights to disagree with the Board of Commissioners. Imposing liability in these circumstances because of the actions of one member of a policymaking body amounts to nothing more than vicarious liability—a theory explicitly rejected by this Court in *Monell* and subsequent decisions.

In addition to being flatly inconsistent with this Court's decisions, the Seventh Circuit's ruling also exacerbates the split in the circuits on this issue. Like the Seventh Circuit in this case, the Eighth Circuit has held that a local government agency can be liable under § 1983 when a single member of a policymaking board violates someone's constitutional rights. The Fourth, Fifth and Ninth Circuits have reached precisely the opposite result, holding that § 1983 liability cannot be imposed on municipalities simply because of the conduct of one member of a policymaking body. See pp. 18-19, *infra*.

It is difficult to imagine an issue that could have a more profound effect on § 1983 litigation against local government agencies (other than the question whether to overrule *Monell* itself). In most local governments, the final policymaker on most issues is a collective body, rather than a single individual. A rule that subjects an agency or municipality to liability because of the actions of a single member of a multi-member policymaking body will vastly increase the scope of potential § 1983 liability for local government agencies—a result that is plainly inconsistent with this Court's decisions interpreting § 1983.

This Court has consistently followed the rule that local government agencies cannot be liable under § 1983 because of the misdeeds of an employee who is not a final

policymaker. In this case, the court of appeals' decision is so plainly and egregiously inconsistent with that principle that it should not be allowed to stand, and summary reversal is justified. Given the gravity of the Seventh Circuit's error and the adverse practical consequences it portends for financially-strapped local governments, review by this Court is plainly warranted.

I. THE COURT OF APPEALS' HOLDING THAT MUNICIPAL LIABILITY MAY BE BASED ON THE CONDUCT OF ONE MEMBER OF A SEVEN-MEMBER BOARD IS FLATLY INCONSISTENT WITH *MONELL* AND ITS PROGENY.

This Court has held that, in § 1983 actions, " 'Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.' " *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 477 (1986) (quoting *Monell*, 436 U.S. at 691). Thus, this Court has emphasized that "the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution." *Monell*, 436 U.S. at 690. The purpose of the "official policy" requirement is "to distinguish acts of the *municipality* from acts of *employees* of the municipality" and to allow recovery only for "acts which the municipality has officially sanctioned or ordered." *Pembaur*, 475 U.S. at 479, 480. A municipality may be liable under § 1983 "only where the municipality *itself* causes the constitutional violation." *City of Canton* v. *Harris*, 489 U.S. 378, 385 (1989). As a result, *respondeat superior* has been explicitly "rejected" under § 1983 (*id.* at 392); a municipality is not liable under § 1983 simply "because it employs a tortfeasor" (*Monell*, 436 U.S. at 691).

Instead, a local government agency acts pursuant to an "official policy"—and is therefore subject to § 1983 liabil-

ity—only when its "final policymak[ers]" have made "decisions [which] have caused the deprivation of rights at issue." *Jett*, 491 U.S. at 737. Local governments may be liable under § 1983 " 'only where' " municipal policymakers make a " 'deliberate choice to follow a course of action.' " *Harris*, 489 U.S. at 389 (quoting *Pembaur*, 475 U.S. at 483-84 (plurality opinion)). Thus, "only those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability," and liability attaches only when the constitutional deprivation occurred "pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business." *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion). Accord *Pembaur*, 475 U.S. at 481 (plurality opinion) (municipal liability attaches "only" where the decisionmaker who causes the constitutional deprivation "possesses final authority to establish municipal policy with respect to the action ordered").

When the final policymaker is a multi-member body, it is clear that decisions made by *that body as a whole* may subject a local government agency to § 1983 liability. *E.g.*, *Pembaur*, 475 U.S. at 480 ("a municipality may be liable under § 1983 for a single decision *by its properly constituted legislative body*") (emphasis added); *Owen* v. *City of Independence*, 445 U.S. 622 (1980) (city liable under § 1983 where city council passed resolution firing police chief without pretermination hearing). This Court has never suggested, however, that actions taken by one member of a legislative body—without even the knowledge or approval of the other members—can establish official government policy under *Monell*. To the contrary, in cases where, as here, final policymaking authority rests with a multi-member body and has not been delegated to other officials, this Court has adhered to the principle that a

decision by the final policymakers *as a group* is required before liability may be imposed under § 1983. See *Pembaur*, 475 U.S. at 483 n.12 (plurality opinion) ("if county employment policy was set by the Board of County Commissioners, *only that body's decisions would provide a basis for county liability*"; once the Board sets the policy, a decision by a non-policymaker "to act unlawfully *would not be a decision of the Board*") (emphasis added); *Praprotnik*, 485 U.S. at 129-30 (plurality opinion) (following *Pembaur*).

The reason that § 1983 liability cannot be imposed based on the acts of a single member of a legislative body is elementary: the final policymaker under state law is the body as a whole, not each individual who is a member of the body at any given time. See *Pembaur*, 475 U.S. at 483 n.12 (plurality opinion); see also *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 821 (1985) (plurality opinion) (a § 1983 plaintiff cannot "establish municipal liability without submitting proof of a single action taken by a municipal policymaker"); *id.* at 829 (Brennan, J., concurring) ("the plaintiff must predicate his recovery on some particular action taken by the city, as opposed to an action taken unilaterally by a nonpolicymaking municipal employee").

Here, for example, the parties agreed, and the jury was instructed, that the CHA's final policymaker under Illinois law was its seven-member Board of Commissioners. App., *infra*, 8a; Tr. 886, 899. See also *Parker* v. *Chicago Housing Authority*, 730 F. Supp. 115, 119-20 (N.D. Ill. 1989). The Board, however, did not fire Hunt. In fact, the court of appeals conceded that "Mr. Hunt was terminated with the approval of Chairman Mooney and the Executive Director." App., *infra*, 6a; see also pp. 7-8, *supra*. Mooney, of course, was only one member of a seven-member Board, Executive Director Beard was not a member of the Board

at all, and there was no evidence that the other six members of the Board even knew that Hunt had been discharged or that they participated in that decision.[7]

Moreover, while Mooney may have been Chairman of the Board, he was only one of seven Commissioners, and he had no authority to act as the CHA's final policymaker on employment matters. The CHA's Board had adopted the agency's employment policies—in the form of the CHA's personnel policies—and Mooney had no authority to unilaterally abrogate those policies. In fact, the personnel policies provided specifically that any policy

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[7] Hunt argued in the court of appeals that the judgment against the CHA could be sustained because the Board itself decided to fire Hunt at the Board meeting held on December 20, 1982. The court of appeals did not accept that argument, holding instead that Hunt was discharged in May 1983 by Mooney and Beard. App., *infra*, 6a. The court's rejection of Hunt's argument is well supported by the evidence. The transcript of the Board's December 1982 meeting indicates plainly that the Board did *not* decide to discharge Hunt. Indeed, at the end of the Board's discussion—which took place in response to *Hunt's* repeated requests that he be fired—the Board's consensus was that Hunt should *not* be fired, but should be given another chance to perform, and that Executive Director Beard would handle any future decisions about Hunt's job, within the constraints of the personnel policies. See p. 6, *supra*. If the Board had really decided to discharge Hunt in December 1982, the two recommendations to fire Hunt in early 1983 undoubtedly would have been approved—but neither was. See p. 7, *supra*.

The court of appeals also concluded properly that the CHA could not be liable on the theory that it delegated its policymaking authority. App., *infra*, 17a. Giving Executive Director Beard the discretion, in this particular instance, to make future decisions about Hunt's employment was not a delegation of the Board's right to establish official policy on employee terminations. Beard was required to follow the personnel policies (see p. 6 & n.3, *supra*), and an employee does not become a final policymaker by being given the discretion to make decisions in a particular matter. See *Praprotnik*, 485 U.S. at 127 (plurality opinion); *Pembaur*, 475 U.S. at 483 n.12 (plurality opinion); *Harris*, 489 U.S. at 387.

changes "must be approved by the Commissioners." Pl. Ex. 46, p. 2. And the personnel policies prohibited Mooney (or anyone else at the CHA) from discharging Hunt in violation of his constitutional rights: the personnel policies required the CHA to comply with federal law and explicitly granted employees the right to disagree with CHA policies. *Id.*, §§ 2001, 2003.4. In short, the official employment policy of the CHA is expressed in the personnel policies adopted by the Board; "those policies, rather than [Mooney's] departures from them, are the act of the [CHA]." *Praprotnik*, 485 U.S. at 127 (plurality opinion).

Nonetheless, the Seventh Circuit concluded that "the CHA was directly responsible for firing" Hunt. App., *infra*, 17a. In so holding, the court of appeals effectively transformed Chairman Mooney into the CHA's final policymaker with respect to employment policy—even though Illinois law provides, as the parties have agreed all along, that *the Board* is the CHA's final policymaker.

If the Seventh Circuit's decision is allowed to stand—that is, if the conduct of a single legislator can subject a local government agency to liability under § 1983—then the foundation of *Monell* will have been eroded completely. The fundamental holding of *Monell* is that "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory" (436 U.S. at 691), and this Court has "repeatedly reaffirmed" that conclusion (*Praprotnik*, 485 U.S. at 122) (plurality opinion). But imposing liability because of the acts of one member of a collective body—allowing one member to establish official policy for the entire Board—is indistinguishable from the imposition of liability based on a vicarious liability theory. It would subject local governments to liability "where no wrong could be ascribed to municipal decisionmakers," but rather "simply because the municipality hired one 'bad apple.' "

Tuttle, 471 U.S. at 821 (plurality opinion).[8] This Court has been unwavering in rejecting attempts to evade the rule laid down in *Monell*,[9] and this latest attempt to sidestep *Monell*'s requirements should be set aside as well. Official policy can be established only by the governmental body charged by law with that responsibility (here, the Board). That rule would be destroyed if § 1983 liability could be imposed based on the acts of an individual member of a multi-member body.

This Court's decisions establish that a local government agency cannot be liable under § 1983 unless a constitutional violation results from actions taken by, or an official policy adopted by, the agency's final policymakers. The court of appeals discarded that long-established principle in this case; it imposed liability on an agency that it concluded was "directly responsible" for the plaintiff's firing (App., *infra*, 17a), even though there was no evidence that the agency's final policymaker—the Board—was involved in the discharge decision at all. The Seventh Circuit's holding exposes municipalities to § 1983 liability based on a theory much more expansive than any ever adopted by this Court. Because the decision of the court of appeals is fundamentally inconsistent with years of controlling precedent, it should be overturned.

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[8] See also *Tuttle*, 471 U.S. at 831 (Brennan, J., concurring) ("To infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and then to hold the city liable on the basis of that policy, would amount to permitting precisely the theory of strict *respondeat superior* liability rejected in *Monell*").

[9] *E.g.*, *Harris*, 489 U.S. at 392 ("permitting cases against cities for their 'failure to train' employees to go forward under § 1983 on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities—a result we rejected in *Monell*"); *Tuttle*, 471 U.S. at 823 (plurality opinion) (rejecting "an approach [that] provides a means for circumventing *Monell*'s limitations altogether").

II. THE CIRCUITS ARE DIVIDED ON WHETHER THE CONDUCT OF ONE MEMBER OF A POLICYMAKING BOARD CAN SUBJECT A MUNICIPALITY TO § 1983 LIABILITY.

In addition to being irreconcilable with this Court's decisions, the Seventh Circuit's ruling in this case is particularly significant because it deepens the disagreement between the circuits on the issue whether § 1983 liability can be imposed on a municipality because of the acts of one member of a policymaking body. In answering that question in the affirmative, the Seventh Circuit has joined the Eighth Circuit, which also imposes § 1983 liability on municipalities for the conduct of individual members of a policymaking body. See *Harris* v. *City of Pagedale*, 821 F.2d 499, 506-07 (8th Cir.) (city liable under § 1983 for acts of individual alderman, even though Board of Aldermen acts only as a collective body under state law), *cert. denied*, 484 U.S. 986 (1987). Thus, local government agencies in the Seventh and Eighth Circuits are exposed to potential § 1983 liability far beyond the narrow limits established by this Court in *Monell* and later cases.

In stark contrast, the other courts of appeals that have confronted the precise issue presented here have remained faithful to *Monell* and its progeny, holding that a government agency is not subject to liability under § 1983 simply because one member of a policymaking Board may act improperly. In *Collinson* v. *Gott*, 895 F.2d 994 (4th Cir. 1990), for example, the Fourth Circuit held that under *Monell*, a county Board of Commissioners is not liable as a matter of law for an alleged First Amendment violation committed by the President of the Board at a public meeting. *Id.* at 1004. The court ruled that the Board President's action—not endorsed or condoned by the Board as a whole—was not "an exercise of policymaking power by one empowered to 'make policy' for the county in the matter at issue." *Ibid.* Similarly, the Ninth Circuit held

in *Lake Nacimiento Ranch Co.* v. *County of San Luis Obispo*, 841 F.2d 872 (9th Cir. 1987), *cert. denied*, 488 U.S. 827 (1988), that the conduct of a single member of a county Board of Supervisors did not establish official county policy: "Under California law, Mankins [one Board member] did not have final authority to establish the County's official policy * * *. The Board of Supervisors may only establish official policy by a majority [vote] of the supervisors." *Id.* at 879. And in *Worsham* v. *City of Pasadena*, 881 F.2d 1336 (5th Cir. 1989), the Fifth Circuit held that a mayor who was one of seven members of the city council was not a final policymaker whose actions could subject the city to § 1983 liability; official policy there was set by the council as a whole, not by the mayor individually. See *id.* at 1340-41 (majority opinion) & 1344-45 (opinion concurring in part and dissenting in part).[10]

In the last 15 years, this Court has devoted considerable attention to the standards that must be satisfied before local government agencies may be held liable under § 1983. In recent years, however, the stringent requirements established by this Court have come under increasing attack, and as we have shown, two circuits have now endorsed a means of circumventing *Monell* entirely when the constitutional deprivation was caused by only one member of a municipality's final policymaking body. Because of the resulting conflict in the circuits, municipalities

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[10] See also *Payung* v. *Williamson*, 747 F. Supp. 705, 708-09 (M.D. Ga. 1990) (a mayor—one of seven members of the city council—was not a final policymaker where his actions were subject to review by the other six council members); *Young* v. *Peoria Housing Authority*, 479 F. Supp. 1093, 1097 (C.D. Ill. 1979) (conduct of one member of four-member policymaking Board of Commissioners does not establish official policy, practice or custom); *Todd* v. *Smith*, 407 S.E.2d 644, 647 (S.C. 1991) (acquiescence of some individual city council members in constitutional violation did not establish official policy and thus did not give rise to § 1983 liability), *cert. denied*, 112 S. Ct. 938 (1992).

across the country cannot predict with any degree of confidence whether they might be subject to § 1983 liability due to the acts of a single legislator. This Court should review the Seventh Circuit's decision in this case to resolve this disagreement between the circuits and to ensure that the lower courts follow *Monell* uniformly in the many cases in which a municipality's final policymaker is a multi-member body.

III. THE STANDARD FOR IMPOSING § 1983 LIABILITY ON LOCAL GOVERNMENT AGENCIES PRESENTS A RECURRING AND IMPORTANT ISSUE.

The unresolved circuit split in this area of § 1983 law is especially alarming because the disagreement in the lower courts on this issue will have a profound and adverse impact on local government agencies. In recent years, shifts in federal spending patterns have meant that local governments have assumed greater responsibilities but have less money to meet those obligations.[11] As a re-

[11] A 1990 General Accounting Office study concluded that federal regulation of states and localities grew over the previous decade. General Accounting Office, *Federal-State-Local Relations: Trends of the Past Decade and Emerging Issues* 2 (March 1990) [hereinafter *GAO Report*]. At the same time, federal aid to states and localities was cut substantially, by $17.2 billion in constant dollars in the period from 1978 to 1988. *Id.* at 15. These cuts fell disproportionately on local governments; indeed, federal aid to the states actually grew an average of 1.3% annually between 1978 and 1986, while federal aid to local governments fell an average of 5.5% a year during the same period. *Id.* at 16. See also Dubrow, *Chapter 9 of the Bankruptcy Code: A Viable Option for Municipalities in Fiscal Crisis?*, 24 Urb. Law. 539, 540 n.3 (1992) [hereinafter Dubrow] (citing a U.S. Conference of Mayors survey of fifty cities showing that federal aid comprised only 6.4% of city budgets in 1990, compared with 17.7% in 1980). In short, "the overall pattern has been more federal involvement with less financial support." *GAO Report* at 26. Couple this trend with an often shrinking tax base; with an electorate already loaded down with a heavy

(Footnote continued on following page)

sult, a number of municipalities stand on the brink of insolvency. See Dubrow, 24 Urb. Law. at 539-41; *Bridgeport's Bankruptcy Petition Offers Reminder of the Plight of Cities, States*, Wall St. J., June 10, 1991, at A12. In short, the meager financial resources available to most municipalities are being stretched to the breaking point as local governments struggle to keep their fiscal houses in order—a problem that is exacerbated by the recent difficult economic climate and by the tendency of juries to inflate damage awards when the defendant is a government entity.[12]

Of course, even in the best of times, "the resources of local government are not inexhaustible." *Harris*, 489 U.S. at 400 (O'Connor, J., concurring and dissenting). But regardless of the state of the economy, judicial decisions that increase the likelihood of § 1983 liability will inevitably require a reallocation of limited municipal resources, and "other city services will necessarily suffer." *Ibid.* See also *Tuttle*, 471 U.S. at 819 n.5 (plurality opinion) ("we may assume that decisions on issues [of municipal liability] are appropriately considered by municipalities in ordering their financial affairs").

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[11] *continued*

tax burden and almost always unwilling to support further increases (see *id.* at 52 (discussing passage of California's Proposition 13)); and with the increased crime, homelessness and other social problems that municipalities face, and the deteriorating financial condition of the nation's cities becomes starkly apparent. See, *e.g.*, *In re City of Bridgeport*, 129 B.R. 332, 335 (Bankr. D. Conn. 1991).

[12] One study of jury verdicts in Chicago over a 20-year period found that jury awards against government bodies are substantially larger than awards against individual defendants for the same kind of injuries. Awards against government defendants on average were about twice as high as awards against individual defendants. A. Chin & M. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* 28-29 (Rand Corp. 1985).

This Court has recognized that adopting a "lesser standard[ ] of fault" under § 1983 "would open municipalities to unprecedented liability"—a result fundamentally at odds with the holding of *Monell*. *Harris*, 489 U.S. at 391-92. That is exactly what the Seventh Circuit has done here and what the Eighth Circuit did in *Harris* v. *City of Pagedale*. If local governments can be held liable under § 1983 for the conduct of each individual legislator—even if the legislative body that is the final policymaker does not adopt or endorse those individual acts—municipalities will be forced to pay damages in numerous lawsuits that involve, at most, misconduct by individual employees. As a result, municipal liability under § 1983 will increase at an explosive and perhaps fiscally ruinous rate. Since the final policymaker in most units of local government is a collective body—be it a city council, a school board or a board of commissioners—the impact of the expansion of § 1983 liability that the Seventh and Eighth Circuits have endorsed will likely be felt in municipalities across the country. The practical significance of the decision below provides another compelling reason for this Court to review the court of appeals' ruling.

CONCLUSION

The petition for a writ of certiorari should be granted, and (1) the judgment below should be summarily reversed, or (2) the case should be set for briefing and oral argument.

Respectfully submitted.

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DECEMBER 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Argued December 12, 1991

August 19, 1992.

Before
Hon. RICHARD A. POSNER, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

JEROME HUNT,

Plaintiff-Appellee,

No. 90-3614 v.

CHICAGO HOUSING AUTHORITY, a municipal corporation, JAMES GILMARTIN and CHARLES CLARKE,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 84 C 3564
Ann Claire Williams, *Judge.*

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

O R D E R

Jerome Hunt, an employee of the Chicago Housing Authority (the CHA), was a vigorous critic of waste and mismanagement in the CHA's elevator maintenance. He was discharged, and brought suit under 42 U.S.C. § 1983

against the CHA, James Gilmartin, and Charles Clarke,[1] alleging that, in firing him, the CHA and the individual defendants had violated his First Amendment right to free speech and his Fourteenth Amendment rights to procedural and substantive due process. He also asserted state law claims of breach of contract and retaliatory discharge. A jury found in his favor on the constitutional claims, and the defendants appeal. For the reasons set forth in this order, we affirm in part and reverse in part the judgment of the district court.

I

BACKGROUND

A. *Facts*

Jerome Hunt has lived in CHA housing since 1966. He frequently and loudly made his views known on the inadequacy of elevator maintenance in CHA housing. Beginning in 1975, Mr. Hunt attended meetings of the CHA's Board of Commissioners (the Board) almost every month and voiced criticisms of the CHA's program of elevator maintenance. In October 1980, the CHA hired Mr. Hunt as a "resident elevator representative," a newly-created position. Mr. Hunt's duties were to

> 1. Serve as a member of the CHA Elevator Committee.
>
> 2. Present to the Committee the views of residents concerning elevator operational problems.
>
> 3. Inform residents of actions and/or proposed actions of the Elevator Committee.

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[1] Another defendant, Winston Moore, who was sued only on the First Amendment claim, received a favorable verdict and is not a party to this appeal.

4. Maintain close liaison with the Local Advisory Councils and Building Councils, by personal visits, so as to be fully informed regarding elevator service.

5. Assist in formulating a general plan for improvement of elevator conditions and service.

6. Perform related duties as assigned.

Plaintiff's Ex. 3. Mr. Hunt worked at putting into order the work tickets and invoices submitted by the elevator repairmen, kept a record of elevators out of service, wrote numerous reports, and as his job description indicates, served as a member of the Elevator Committee. After the Elevator Committee was disbanded in 1981, Mr. Hunt continued to file reports and to attend the public CHA Board meetings. Apparently Mr. Hunt attended some of these meetings on his own time as a private citizen. He continued to voice his criticisms there: many elevators were out of order on any given day; the repair budget was not well spent; needed parts were unavailable; he believed that repairmen employed by Westinghouse, the company under contract to maintain the elevators, sabotaged the elevators and charged for work that was never done.[2]

At the meetings, on more than one occasion, Charles Swibel, the chairman of the Board, expressed displeasure at Mr. Hunt's voicing his criticisms in public rather than going through the "chain of command" within the agency. At one meeting, Andrew Mooney, who was then the

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[2] Mr. Hunt's charges were not without foundation; the serious inadequacies of CHA management and abuses by the Westinghouse repairmen are discussed in detail in a report prepared by HUD. *See* Plaintiff's Ex. 11 (*Review and Analysis of the Chicago Housing Authority and Implementation of Recommended Changes*, Chapter 12, "Elevator Maintenance" (March 31, 1982)).

Executive Director and later replaced Swibel as chairman, told Mr. Hunt: "Mr. Hunt, I would prefer if you did not yell at the board, whether you are here as a private citizen or as an employee of this Authority. . . . I finally have gotten tired of you talking to this board this way." Another meeting, at which Mr. Hunt was vociferously critical, was also attended by Winston Moore, the CHA's director of security, and James Simpson, the CHA's director of maintenance. According to Mr. Hunt, Winston Moore, the CHA's director of security, sat behind Mr. Hunt, told Mr. Hunt he was not supposed to attend the meetings, repeatedly interrupted him and directed Mr. Hunt's attention to Simpson. When Simpson saw Mr. Hunt after the meeting, Simpson, who was not Mr. Hunt's immediate supervisor, told Mr. Hunt to sign out and go home. Mr. Hunt refused and also refused to give Mr. Simpson a description of his job assignments for the rest of the day. When Simpson later told defendant Charles Clarke, who was Mr. Hunt's supervisor and had also been present at the meeting, that Mr. Hunt had been insubordinate, Clarke placed Mr. Hunt on probation. This was the first time that Mr. Clarke disciplined Mr. Hunt. While on probation, Mr. Hunt performed his job in a satisfactory manner, and February 2, 1982, Mr. Clarke gave Mr. Hunt a satisfactory evaluation and recommended that he be taken off probation.

On December 20, 1982, the Board held an executive session. One of the topics discussed was the job description of the "CHA resident elevator representative." After some discussion, Commissioner Leon D. Finney stated, "I have a problem seeing why [Mr. Hunt] would come to a meeting and publicly vent his frustration" and then,

> I don't think this board ought to get involved in termination or hiring. That is my own judgment. That is why I am having a problem with this individual.

> I think those responsibilities are for the staff positions, and that is how I like to run my organization.
>
> I don't want to get involved in hiring and firing at this level. That is the wrong level for us.
>
> I think the appropriate thing for us to do is to instruct the Executive Director to take this matter under consideration, to deal with it and get it out of here. That is my judgment.

Id. at 17-18. If he doesn't perform, he should be taken out of the organization." *Id.* at 19. The Board then agreed that "the Executive Director will revise the description and take appropriate action based on that job description." *Id.* at 20.

Apparently nothing was done to revise Mr. Hunt's job description, but in January 1983, at Chairman Mooney's direction, James Gilmartin, the CHA's new personnel director, held a "hearing" over complaints by Michael Davis, a housing manager, that Mr. Hunt had been rude and abusive.[3] Mr. Hunt was not present and was not informed of the hearing, which was attended by Mr. Gilmartin, Davis, Mr. Clark and two other CHA supervisors. At the hearing it was decided not to terminate Mr. Hunt "because of the lack of written documentation supporting the allegations." Plaintiff's Ex. 29 at 2. Mr. Gilmartin recommended that Mr. Hunt's position be eliminated, or that a revised job description be developed, and that thereafter Mr. Hunt's performance should be closely monitored and documented.

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[3] The minutes of the hearing indicate that Davis complained that Mr. Hunt had accused him in the presence of others of being incompetent and of stealing from the CHA. Davis later was terminated for practicing law at a local courthouse while he was supposed to be on the job at the CHA. *See* Plaintiff's Ex. 55.

Soon after, Mr. Clarke recommended that Mr. Hunt be terminated for attending a Board meeting without signing out from work and "while in the pay of the Chicago Housing Authority," in violation of a CHA rule (apparently unwritten) and Mr. Clarke's direct order. At trial, Mr. Clarke could not remember whether Mr. Hunt had ever before attended a Board meeting without signing out or why he had admonished Mr. Hunt not to do so. Mr. Hunt testified that he did sign out before going to the meeting. On February 23rd, after celebrating Harold Washington's victory in the democratic primary for mayor, Mr. Hunt came to work intoxicated, "knocked a little too hard" on the dispatcher's window, and broke it. Def.'s Exs. 16 & 17 (Incident Report of CHA Security Officer). Mr. Clarke and Mr. Gilmartin again recommended that Mr. Hunt be terminated, although at trial Mr. Gilmartin conceded that other CHA employees were not terminated for drunkenness except for multiple instances or a "severe problem in the field." Tr. Vol. 3 at 163-64.

On April 22 and April 25, 1983, Mr. Hunt worked late and missed the 4:30 deadline for signing out at the Central Maintenance office. Mr. Hunt testified that on the 22nd, when he realized that he would be late, he called the central office but was not put through to Mr. Clarke. He then went over to the central office, but was not allowed to sign out. On the 26th, Mr. Clarke told Mr. Hunt he was going to dock him for two days pay, and Mr. Hunt stated in response that Mr. Clarke knew he had worked and was a "damn liar." Mr. Clarke then suspended Mr. Hunt without pay. Mr. Hunt sent a written request for a grievance hearing to Mr. Clarke and Mr. Gilmartin. After Mr. Hunt was terminated with the approval of Chairman Mooney and the Executive Director, a hearing was held. A few days later, Mr. Gilmartin notified Mr.

Hunt in writing that it had been determined that his "termination was for just cause and in compliance with current CHA policies and procedures." Plaintiff's Ex. 43.

The CHA policies and procedures were adopted by the Board of Commissioners in 1978 and printed in a manual entitled "Personnel Procedures." The manual states that "discharges for cause shall be made only after adequate previous warning except in cases of extreme offense," *id.* at § 2019, and that "[a]n employee may be dismissed for just cause." *Id.* at § 2621. The manual also states that aggrieved employees have the "right to have any personnel action, condition or situation brought to the attention of administrative officials with a right to appeal to higher levels and to the Executive Director." *Id.* at § 2461. The purpose of the procedure is to assure just and equitable treatment to employees within the framework of the policies of the Commission." *Id.* Mr. Hunt testified that he read the CHA personnel procedures manual, including the section on termination for cause before beginning work at the CHA.

Mr. Gilmartin, who became the CHA's director of personnel in 1982, testified (after some refreshing of his recollection with his testimony at the earlier trial) that the personnel manuals were "all over the place" and "in every facility in the CHA." Tr. Vol. 2 at 147. He also testified that a purpose of the manuals was to define the rights of the employees, and that employees would telephone or write with questions about the policies.

B. *District Court Proceedings*

Hunt sued the CHA and individual defendants for terminating his employment in violation of his first amendment rights, procedural due process, and substantive due

process. He also alleged breach of contract (the contract being derived from written employment policies) and retaliatory discharge. Three jury trials of Mr. Hunt's claims took place. The first jury rendered a verdict in favor of Mr. Hunt, but the district court granted judgment notwithstanding the verdict in favor of the defendants. This court vacated the judgment n.o.v. and remanded for a new trial. At the second trial, the jury was unable to reach a verdict and a mistrial was declared.

A third trial was held. In preliminary proceedings, the court denied the individual defendants' motion for dismissal on grounds of qualified immunity.[4] It also ruled that under *Connick v. Myers*, 461 U.S. 138, 147 (1983), Mr. Hunt's criticisms of elevator maintenance were speech protected by the First Amendment and that, under *Rankin v. McPherson*, 483 U.S. 378, 388 (1987), Mr. Hunt's "free speech right far outweigh[ed] any interests the CHA m[ight] have as to efficiency." Tr. Vol. 21 at 731 (Dec. 11, 1989). The parties stipulated that, under state law, the Board of Commissioners of the CHA were policymakers for hiring and firing.

The jury found against CHA in favor of Hunt on his First Amendment claim, but found for the individual defendants. On Hunt's procedural and substantive due process claims, the jury found for Hunt against the CHA and individual defendants. On retaliatory discharge and breach of contract, the jury found for the defendants.

The district court denied the defendants' motion for a judgment n.o.v. or a new trial. The district court stated

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[4] No interlocutory appeal was taken from the district court's ruling on qualified immunity, although such an appeal was of course possible. *See Juriss v. McGowan*, 957 F.2d 345, 346 (7th Cir. 1992).

that there was sufficient evidence to support the verdict on the First Amendment claim, that the verdicts on the retaliatory discharge and contract claims were not inconsistent with the verdict on the first amendment claim. The district court also stated that there was sufficient evidence to support the verdicts on the procedural and substantive due process claims and to support a finding, which was necessary to those claims, that Mr. Hunt had a property interest in his employment.

II

ANALYSIS

The appellants appeal the district court's ruling that the individual defendants were not entitled to qualified immunity. They also contend that errors in the instructions to the jury necessitate a new trial, and they appeal the district court's denial of their motion for judgment notwithstanding the verdict or, alternatively, for a new trial.

A. *Qualified Immunity*

The district court held that the individual defendants' were not entitled to qualified immunity on any of Mr. Hunt's Constitutional claims. Because the jury found that the individual defendants were not liable on Mr. Hunt's First Amendment claims, the issue of qualified of immunity on appeal concerns only the due process claims. The district court denied the individual defendants qualified immunity on the due process claims, stating that "[t]he law has been clear since at least 1972 that an employee with a property interest in his employment is entitled to due process protection." Memorandum Opinion and Order,

No. 84 C 3564, at 3-4 (December 12, 1989).[5] The individual defendants appeal the district court's decision on qualified immunity in regard to both Mr. Hunt's procedural due process claim and his substantive due process claim.

This court reviews de novo a district court's summary judgment determination regarding qualified immunity. *See Upton v. Thompson*, 930 F.2d 1209, 1211 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1262 (1992). Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). For liability, the "right the official is alleged to have violated must have been 'clearly established' in a 'particularized' way and 'the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " *Upton*, 930 F.2d at 1212 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "[I]n order to determine whether the law was clearly estab-

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[5] The district court's order and opinion stated that the defendants failed to raise the issue of qualified immunity for the *substantive* due process claims in its trial brief. The court ruled that the defendants had waived qualified immunity on that claim or, alternatively, that they were not entitled to qualified immunity. On appeal, appellants address the issue of qualified immunity for the substantive due process claim on the merits. They do not raise any challenge to the district court's finding that they waived the issue. However, while it is true that, in their brief to the district court on qualified immunity the defendants raised no distinct arguments specifically directed to substantive due process, their argument that Mr. Hunt had no property interest in his job was directed toward the "due process claims" (plural). Supplemental R.7. In his appellate brief, Mr. Hunt makes no mention the district court's finding of waiver on the issue of substantive due process.

lished at the time of the defendant's alleged violation, a court cannot look at the legal norm at issue in the abstract." *Green v. Carlson*, 826 F.2d 647, 649 (7th cir. 1987); *see also Warlick v. Cross*, Nos. 90-3170 and 90-3802, slip op. at 11 (7th Cir. July 17, 1992). "Rather, the test for qualified immunity is 'whether the law was clear in relation to the specific facts confronting the public official when [he or she] acted." *Green*, 826 F.2d at 649; *Warlick*, slip op. at 11. For Mr. Hunt to defeat the defendants' claim of qualified immunity on the due process claims, he must show "that he had a clearly established property interest in continued employment" with the CHA. *Hannon v. Turnage*, 892 F.2d 653, 656 (7th Cir.), *cert. den.*, 111 S. Ct. 69 (1990).[6] A property interest in employment must spring from a "legitimate claim of entitlement to it" under state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The defendants submit that, if Mr. Hunt had such a right, it was not clearly established under Illinois law at the time of his firing in the spring of 1983. Whether a right is clearly established is also "a purely legal question which requires this court to apply a *de novo* standard of review." *Apostol v. Landau*, 957 F.2d 339, 342 (7th Cir. 1992). The burden is on the plaintiff to prove that the right in question was clearly established at the time of the alleged violation. *Hannon*, 892 F.2d at 656.

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[6] *See also Spuler v. Pickar*, 958 F.2d 103, 108 (5th Cir. 1992): To succeed in his challenge to the defendants' qualified immunity, Spuler must show that at the time the University determined to terminate his contract, a reasonable university official would have known that termination under like circumstances would have violated Spuler's due process rights. In sum, Spuler would have to show that a non-tenured professor had a clearly-established, constitutionally-protected interest in continued University employment, and that denying him tenure for financial reasons was arbitrary and capricious.

In *Duldulao v. St. Mary of Nazareth Hospital Center*, 505 N.E.2d 314 (Ill. 1987), the Illinois Supreme Court held that "when traditional requirements for contract formation are present, 'an employee handbook or other policy statement creates enforceable contractual rights.' " *Mitchell v. Jewel Food Stores*, 568 N.E.2d 827, 828 (Ill. 1991). Before the 1987 decision in *Duldulao*, however, cases in the Illinois intermediate appellate courts "trace[d] a wavering line . . . on the issue whether an employees' handbook or manual transforms employment at will into employment under contract." *Enis v. Continental Illinois Nat'l Bank & Trust Co.*, 795 F.2d 39, 40 (7th Cir. 1986). As the Illinois Supreme Court stated in *Duldulao*,

> This court has never specifically addressed the issue of employee handbooks. Our appellate court, however, has addressed the issue several times, with conflicting results. In *Carter v. Kaskaskia Community Action Agency* (1974), 24 Ill. App.3d 1056, 322 N.E.2d 574, the court held that an employee manual, which was introduced after the employee began working and was written with input from the employees, created enforceable contractual rights. However, in *Sargent v. Illinois Institute of Technology* (1979), 78 Ill. App.3d 117, 33 Ill Dec. 937, 397 N.E.2d 443, the court distinguished *Carter* and held that the handbook in question was not binding because it was given to the employee when he first began work and was not specifically "bargained for." (78 Ill. App. 3d 117, 33 Ill. Dec. 937, 397 N.E.2d 443.)

Duldulao, 505 N.E. 2d at 317. The only federal court to have addressed the issue under Illinois law before 1983 followed *Sargent*. *See Rynar v. Ciba-Geigy Corp.*, 560 F. Supp. 619 (N.D. Ill. 1983). Although, by the time of the Illinois Supreme Court's decision in *Duldulao*, "the overwhelming majority of courts considering the issue ha[d] held that an employee handbook m[ight], under proper cir-

cumstances, be contractually binding," *Duldulao*, 505 N.E.2d at 317, nearly all of the many cases cited by the Illinois Supreme Court in *Duldulao* were decided in 1984 or after. *See id.* Thus, we must conclude that in 1983, at the time of Mr. Hunt's firing, it was not yet clearly established that an employee manual or handbook could create a property interest in employment under Illinois law, particularly in the circumstances present here. The individual defendants were entitled to qualified immunity on Mr. Hunt's due process claims.

B. *Jury Instructions*

1. Standard of review

This court's review of jury instructions is limited. *See New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1483 (7th Cir. 1990). "When reviewing a challenge to a jury instruction, we must view the instruction as a whole and consider the challenged instruction 'both in the context of the other instructions given and in light of the allegations of the complaint, opening and closing arguments and the evidence of record.' " *Lynch v. Belden & Co.*, 882 F.2d 262, 267 (7th Cir. 1989) (quoting *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 830 F.2d 716, 725 (7th Cir. 1987)). The instructions "must be construed in a 'common sense manner, avoiding fastidiousness, inquiring whether the correct message was conveyed to the jury reasonably well." *General Leaseways*, 830 F.2d at 725. Even if a jury instruction is determined to be erroneous, "we will not find reversible error absent some effect on the substantial rights of the parties." *Vaughn v. Willis*, 853 F.2d 1372, 1376 (quoting *General Leaseways*, 830 F.2d at 725); *see also Bruno v. City of Crown Point*, 950 F.2d 355, 360 (7th Cir. 1991) (jury verdicts not reversed " '[e]ven if we

should discern error in one or more instructions . . . unless we are persuaded the jury's understanding of the issue was seriously affected' " to the prejudice of the complaining party) (quoting *Wilk v. American Medical Ass'n*, 719 F.2d 207, 218-19 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984)), *cert. denied*, 112 S. Ct. 2998 (1992). The "burden of showing prejudice rests with the party raising the error at issue," *Vaughn*, 853 at 1376, and our determination as to prejudice must be based on the record as a whole. *Id.* at 1377.

Under Rule 51 of the Federal Rules of Civil Procedure, "[n]o party may assign as error the giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51. As this court has stated, "[t]he purpose of the objection is to give the trial court an opportunity to correct any errors it has made. Failure to properly object waives any challenge on appeal." *Bob Willow Motors, Inc. v. General Motors Corp.*, 872 F.2d 788, 794 (7th Cir. 1989); *see also Gong v. Hirsch*, 913 F.2d 1269, 1277 (7th Cir. 1990) (no plain error doctrine for civil jury instructions); *Deppe v. Tripp*, 863 F.2d 1356, 1361 (7th Cir. 1988) (same). "Not only must the party object to the jury instruction, its 'objection must be sufficiently detailed to draw the court's attention to the defect [in the jury instruction].' " *Sims v. Mulcahy*, 902 F.2d 524, 535 (7th Cir.) (quoting *Williamson v. Handy Button Mach. Co.*, 817 F.2d 1290, 1295 (7th Cir. 1987)), *cert. denied*, 111 S. Ct. 249 (1990).

2. Instructions on CHA's liability on constitutional claims

The jury instructions on Mr. Hunt's three constitutional claims each included a section on the circumstances in

which the jury could find the CHA (as opposed to the individual defendants) liable. On the free speech claim, the jury was instructed:

> In addition to the individuals who are defendants in Hunt's free speech claim, the Chicago Housing Authority is also a defendant. The Chicago Housing Authority, which is also called CHA, is a municipal corporation. Under Illinois law, CHA's board of commissioners is charged with the duty to make CHA's policy as to discharge of employees. To find CHA liable on Hunt's free speech claim, you must find CHA's board responsible for the unlawful conduct.
>
> CHA's board need not have put an unlawful policy in writing, however, Rather, you should find CHA liable on Hunt's free speech claim if you find either one, that the board decided to discharge Hunt for his speech, or two, that the board delegated the responsibility to make CHA's discharge policy to one or more other officials at CHA who then discharged Hunt for his speech, or three, that the board approved Hunt's discharge for his speech.
>
> If Hunt has merely shown that the CHA board failed to investigate the basis for his discharge, this does not amount to the board delegating its discharge policy, and you should find in favor of CHA on its free speech claim, even though you may find other defendants liable on this claim.
>
> However, if Mr. Hunt has shown [that the] CHA board failed to investigate the basis for his discharge after having been given reason to believe that he was being discharged for his speech, you may then find CHA liable.

Tr. Vol. 11 at 886. Essentially similar instructions were given with regard to CHA's liability on Hunt's procedural and substantive due process claims.

The appellants challenge the instruction quoted above on two grounds: (a) they submit that the final sentence,

permitting the jury to find CHA liable "if Mr. Hunt has shown [that the CHA board failed to investigate the basis for his discharge after having been given reason to believe that he was being discharged for his speech," is legally erroneous; and (b) they contend that it was error to submit to the jury the issue whether "the board delegated the responsibility to make CHA's discharge policy to one or more other officials at CHA." According to the appellants, this issue should have been decided by the court.

a.

The appellants challenge the portion of the instruction regarding liability for failure to investigate on the ground that the instruction "does not require either that the Board approved of Hunt's discharge or that it knew of an allegedly impermissible basis for it." Appellants' Br. at 26. Equating "reason to believe" or "reason to know" with "should know," they contend that this instruction allowed the jury to find CHA liable for "nothing more than negligence," and that " 'merely negligent or even grossly negligent misconduct by state officers is not actionable under section 1983.' " Appellants' Reply Br. at 12 (quoting *K.H. v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990). Citing *St. Louis v. Prapotnik*, 485 U.S. 112, 130 (1988), the appellants contend that a plaintiff must prove that "the authorized policymakers approved both the decision and the basis for it." Mr. Hunt argues that, read as a whole, the instruction properly requires the jury to find the CHA liable only if it was "responsible" for an unlawful act. Appellee's Br. at 45-46. He submits that the instruction makes clear that a mere failure to investigate was not sufficient basis for liability; that failure had to

be accompanied by knowledge or reason to believe that the discharge violated the Constitution.[7]

Any error was clearly not prejudicial. On the First Amendment claim, only the CHA was found liable; the jury found in favor of all the individual defendants. Thus, it is clear that the jury found that the CHA was directly responsible for firing Mr. Hunt in violation of his First Amendment rights. There is no realistic possibility that the jury based the CHA's liability on the theory that the CHA failed to investigate Mr. Hunt's discharge (or on the theories that it merely approved the discharge or that it delegated its policymaking authority to the individual

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[7] Although the terms "reason to believe" or "reason to know" are occasionally used interchangeably with "should know" or should have known," the terms are not synonymous. "The words 'reason to know' . . . denote the fact that the actor *has information* from which a person of reasonable *intelligence* . . . would infer that the fact in question exists" while "[t]he words 'should know' . . . denote the fact that a person of reasonable *prudence and intelligence* . . . *would ascertain* the fact in question in the performance of his duty to another." Restatement of Torts (Second) § 12 (1965) (emphasis added). The Restatement explains the difference:

> Both the expression "reason to know" and "should know" are used with respect to existent facts. These two phrases, however, differ in that "reason to know" implies no duty of knowledge on the part of the actor whereas "should know" implies that the actor owes another the duty of ascertaining the fact in question. "Reason to know" means that the actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist. "Should know" indicates that the actor is under a duty to another to use reasonable diligence to ascertain the existence or non-existence of the fact in question and that he would ascertain the existence thereof in the proper performance of that duty.

Id. at § 12 cmt. a.

defendants). Moreover, the jury's verdict on the First Amendment claim renders it extremely doubtful that its verdicts against the CHA on Mr. Hunt's procedural and substantive due process claims were based on a theory of derivative liability.

b.

The same analysis holds with respect to delegation of policymaking authority.[8] Given the jury's determination that CHA was directly responsible for firing Hunt for speech protected by the First Amendment and its exoneration of the individual defendants, it is extremely unlikely that the jury's verdict on the due process claims

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[8] The Supreme Court has made it clear that the identity of those officials to whom state law has delegated policymaking authority is an issue for the court, not for the jury. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) ("[W]hether a particular official has 'final policymaking authority' is a question of state law. As with other question of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury."). In the present case, the district court properly decided that issue. It is somewhat less clear if the court must also decide whether an official possessing policymaking authority under state law has delegated that authority to another official. However, the Eleventh Circuit has stated that this also is an issue to be decided by the trial court before the case is submitted to the jury. *See Mandel v. Doe*, 888 F.2d 783, 792 (11th Cir. 1989).

Mr. Hunt asserts that the defendants waived this objection because they failed to include it in their written objections to the plaintiff's proposed instructions and only objected to it orally in conference before the district court (at which time, he further suggests, they misled the court into believing they had included the objection in their written objections). However, as the defendants point out, because Mr. Hunt did not object to this procedure below, he has waived waiver.

was based on the theory that the CHA delegated its policymaking authority to Clarke and Gilmartin, who then exercised that authority to discharge Mr. Hunt in violation of his due process rights. The erroneous submission of an issue to the jury does not require reversal or a new trial absent some prejudice caused by the error. *See Bob Willow Motors*, 872 F.2d at 796; *Woods v. Sammisa Co.*, 873 F.2d 842, 849 (5th Cir. 1989) (no new trial required if court is "reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it), *cert. denied*, 493 U.S. 1050 (1990). We are confident that the submission of the issue whether the CHA had delegated its policy-making authority did not affect the verdict.

3. Property interest

The appellants also challenge other portions of the instructions on the substantive and procedural due process claims. On Mr. Hunt's procedural due process claim, the court gave the following instruction to the jury to aid it in determining whether Mr. Hunt had a property interest in continued employment:

> The 14th Amendment to [the] United States Constitution prohibits any municipal corporation, such as CHA and by extension, any employee of CHA from depriving any person of property without due process of law. Employment can be property within the meaning of this constitutional protection. For instance, if Hunt had an employment contract with CHA that contract is property within the meaning of the constitution.
>
> Therefore, if in your deliberations on Hunt's contract claim, you find that the personnel policies in Plaintiff's Exhibit 46 constitute a contract, you should also find that Hunt had a property right in his em-

> ployment. Even if you do not find that the personnel policies in Plaintiff's 46 are a contract, however, Hunt can still prove that his employment constituted property and, therefore, can recover on his procedural due process claim.
>
> If you find that Hunt legitimately and reasonably relied on a promise from CHA that he would only be fired for just cause, you should find that plaintiff had a property right in his employment. To find that Hunt had a property right in his employment it is not necessary that Hunt and CHA reached agreement that he would only be fired for just cause at the same time or in the same conversation. Rather, it is only necessary that Hunt and CHA had a mutual understanding that he would be fired only for just cause. If you find that Hunt did not have a property interest in his employment whether as a contract or as a reasonable reliance on a promise you should find in favor of each of the defendants on the procedural due process claim.

Tr. Vol. 11 at 896-67 (February 15, 1990). The court instructed the jury that its finding on whether Mr. Hunt had a property interest in his employment for the procedural due process claim applied as well to Mr. Hunt's substantive due process claim.

Whether these instructions are legally correct, however, is an issue we need not decide. As Mr. Hunt points out, the appellants did not specifically object in the district court to the deficiencies they now allege in the instructions on property rights in employment. In the district court, the thrust of the defendants' objection was that it permitted the plaintiff to recover on the basis of "a unilateral expectation" or reliance on a "perceived" requirement that he would be fired only for cause. R.243 at 3. Since the portion of the instruction to which the defendants objected required the jury to find that "Hunt legitimately and reasonably relied on a *promise* from CHA that

he would only be fired for just cause and that "Hunt and CHA had a *mutual* understanding that he would be fired only for just cause," it is not surprising that the district court denied the defendants' objection. Tr. Vol. 11 at 896 (emphasis supplied).

The appellants now assert that it was "flatly inconsistent with Illinois law"[9] (which they properly assert must be the source of any property right) to instruct the jury that Mr. Hunt had a property right in his employment if he "legitimately and reasonably relied on a promise from CHA that he would only be fired for just cause." Appellants' Br. at 34. The appellants submit that "[t]he only conceivable basis under Illinois law for this standard is the theory of promissory estoppel," but that the instruction omits the "well-established" elements necessary to estoppel under Illinois law, namely that "(1) defendants made an unambiguous promise to plaintiff, (2) plaintiff relied on such promise, (3) plaintiff's reliance was expected and foreseeable by defendants, and (4) plaintiff relied on the promise to its detriment." *Id.* (quoting *Quake Constr., Inc. v. American Airlines, Inc.*, 565 N.E.2d 990, 1004 (Ill. 1990). Moreover, according to the appellants, because a municipal corporation is a defendant, the plaintiff's reliance must be substantial.

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[9] It is not clear under what circumstances a "mutually explicit understanding," *see Perry v. Sindermann*, 408 U.S. 593, 601 (1972), could give rise to a property interest in employment under Illinois law. *See Hohmeier v. Leyden Community High Sch. Dist. 212*, 954 F.2d 461, 465 n.2 (7th Cir. 1992); *Lee v. County of Cook*, 862 F.2d 139, 142-43 (7th Cir. 1988); *Leahy v. Board of Trustees of Community College Dist. No. 508*, 912 F.2d 917, 922 n.7 (7th Cir. 1990). However, we stated in *Hohmeier* that nothing in the caselaw "suggests that *Duldulao* provides the only way for a public employee to establish a property interest in his or her job." *Hohmeier*, 954 F.2d at 465.

The appellants now bring a specific and detailed challenge to the instruction. However, they failed to alert the district court to these defects by "stating distinctly the matter objected to and the grounds of the objection" in the district court, as Rule 51 requires, nor did they propose an instruction incorporating fully the theory they now urge. Therefore, the objection is waived. *See Sims*, 902 F.2d at 535.

4. Substantive due process

Appellants also challenge the jury instruction on substantive due process. The court instructed the jury:

> If you found that plaintiff had a property interest in his employment either as a contract or as reasonable reliance on a promise, the due process clause of the 14th Amendment prohibits plaintiff's discharge for reasons that are arbitrary or capricious or for improper motive.
>
> If you find that the defendants fired Hunt in violation of his right to free speech or in retaliation for his furtherance of a public policy of Illinois, those would be arbitrary, capricious and improper reasons for termination.
>
> Even if you find that Hunt's speech was not the reason for the defendant's [sic] termination of Hunt's employment or that the discharge was not in retaliation for Hunt's furthering of public policy of Illinois, however, you could find a violation of Hunt's substantive due process rights if you find that the defendants were arbitrary or capricious in firing Hunt or they acted in some irrational way.

Tr. Vol. 11 at 903. The defendants acknowledge that the first possibility for finding liability (if the defendants fired Mr. Hunt in violation of his right to free speech) was proper. The defendants challenge the second and third possibilities for finding liability (if the defendants fired Mr.

Hunt in retaliation for furtherance of Illinois public policy or simply were arbitrary, capricious or irrational in firing Mr. Hunt). It argues that these last alternatives were improper because they permit the jury to find that Mr. Hunt's right to substantive due process was violated by mere deprivation of property without a showing of some other separate constitutional violation or of the inadequacy of state law remedies.

This court has acknowledged that a substantive due process claim can be brought in the context of property interests. *See New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1480 (7th Cir. 1990). However, we have required that, "in addition to alleging that the decision was arbitrary and irrational, 'the plaintiff must also show either a separate constitutional violation or the inadequacy of state law remedies.' " *Id.* at 1481 (quoting *Polenz v. Parrott*, 883 F.2d 551, 558 (7th Cir. 1989). "In cases where the plaintiff complains that he has been unreasonably deprived of a state-created property interest, without alleging a violation of some other substantive constitutional right or that the available state remedies are inadequate, the plaintiff has not stated a substantive due process claim." *Kauth v. Hartford Ins. Co.*, 852 F.2d 951, 958 (7th Cir. 1988); *accord Sutton v. Cleveland Bd. of Educ.*, 958 F.2d 1339, 1351 (6th Cir. 1992). *But see Moore v. Warwick Pub. Sch. Dist.*, 794 F.2d 322, 329 (8th Cir. 1986). The instruction, then, insofar as it permitted the jury to find that defendants had violated Mr. Hunt's substantive due process rights in the absence of an independent constitutional violation or any demonstration that there were no adequate state remedies, was incorrect. Therefore we must determine whether the error was harmful.

As we noted above, an error is not harmful absent "some effect on the substantial rights of the parties." *Vaughn*, 853 F.2d at 1376 (quoting *General Leaseways*, 830 F.2d at 725). We shall not reverse a jury verdict " '[e]ven if we should discern error in one or more instructions . . . unless we are persuaded the jury's understanding of the issue was seriously affected' " to the prejudice of the complaining party. *Bruno*, 950 F.2d at 360 (quoting *Wilk v. American Medical Ass'n*, 719 F.2d 207, 218-19 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984)). Here, given our determination that the individual defendants are shielded by qualified immunity, we need examine only the effect of the instructional error on the CHA. *See Bruno*, 950 F.2d at 360. As the defendants concede in their brief, because the jury found the CHA liable for a separate constitutional violation—firing Mr. Hunt in violation of the First Amendment —, there can be no harmful effect from this erroneous instruction unless the jury's verdict against the CHA on the First Amendment claim is infirm. The CHA appeals that verdict on the ground that it is not sufficiently supported by the evidence. Because, as will become clear from our analysis below, it is our conclusion that the jury's verdict on Mr. Hunt's First Amendment claim must be upheld, it follows that the instructional error under discussion was harmless.

C. *Sufficiency of the Evidence*

1. Standard of review

The CHA appeals the district court's denial of judgment n.o.v., challenging the sufficiency of the evidence on both the First Amendment claim and the due process claims. We review de novo the district court's denial of a motion for judgment notwithstanding the verdict. *See Bruno*,

950 F.2d at 361; *Aungst v. Westinghouse Elec. Corp.*, 937 F.2d 1216, 1219 (7th Cir. 1991). In determining whether the evidence is sufficient to support the verdict, we take the evidence and all reasonable inferences from it in the light most favorable to the party winning the verdict. *Bruno*, 950 F.2d at 361; *Aungst*, 937 F.2d at 1219-20. We do not judge the credibility of the witnesses, nor do we weigh the evidence as a fact finder. *Collins v. Illinois*, 830 F.2d 692, 697 (7th Cir. 1987). "Rather, we 'weigh the evidence to the extent of determining whether the evidence to support the verdict is *substantial*; a mere scintilla of evidence will not suffice.' " *Collins*, 830 F.2d at 697-98 (quoting *La Montagne v. American Convenience Prods., Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984)).

When a jury instruction becomes the law of the case through a party's failure to object properly at trial, the party is precluded from arguing that the jury's verdict was contrary to the appropriate legal standard. *Sims*, 902 F.2d at 536. As this court has explained:

> If a party could argue that the evidence was insufficient under the correct legal standard, this would be an indirect method of attacking the instructions. . . . Once the law of the case is settled by the failure to object to the instructions, the parties may argue only that the jury did not play its proper part. Because the jury's part is to apply the instructions to the facts, we may scrutinize its conclusions only to find out whether it did so.

Will v. Comprehensive Accounting Corp., 776 F.2d 665, 675 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986); *see also Rakovich v. Wade*, 850 F.2d 1180, 1192 (7th Cir. 1988) (*en banc*), *cert. denied*, 488 U.S. 968 (1988).

We have examined the record thoroughly in light of these standards and are convinced that, with respect to

each claim, the district court was correct in denying the CHA's motion. The evidence, viewed in the light most favorable to Mr. Hunt, was sufficient to support the jury's verdicts both on the First Amendment claim and the due process claims, and, therefore, the district court's denial of judgment notwithstanding the verdict was correct.

Alternatively, the appellants submit that the district court erred in denying their motion for a new trial. "The authority to grant a new trial 'is confided almost entirely to the exercise of discretion on the part of the trial court.' " *Smith v. Great Am. Restaurants, Inc.*, Nos. 91-1793 & 91-1864, slip op. at 5 (7th Cir. July 24, 1992). "A district court may grant a new trial 'only where the verdict is against the clear weight of the evidence, and we will reverse the district judge's decision only where there is a clear abuse of discretion.' " *Trzcinski v. American Cas. Co.*, 953 F.2d 307, 315 (7th Cir. 1992) (quoting *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1407 (7th Cir. 1991)). "We will not set aside a jury verdict if a reasonable basis exists in the record to support the verdict." *Id.* In the present case, having examined the record in detail, we cannot say that the verdict is against the clear weight of the evidence. The district court did not abuse its discretion by denying the appellants' motion for a new trial.

Conclusion

For the foregoing reasons, the judgment of the district court entered in favor of Mr. Hunt and against the CHA is affirmed. The judgment of the district court denying the individual defendants qualified immunity is reversed.

AFFIRMED IN PART and
REVERSED IN PART

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JEROME HUNT, Plaintiff,	)	
v.	)	Case No. 84 C 3564
CHICAGO HOUSING AUTHORITY, et al., Defendants.	)	

[Docketed: September 13, 1990]

MEMORANDUM OPINION AND ORDER

Jerome Hunt sued the Chicago Housing Authority and various individual defendants for violation of his First Amendment rights, retaliatory discharge, breach of contact, violation of procedural due process, and violation of substantive due process. The jury found in his favor on the First Amendment claim against the CHA but not the individual defendants, on the procedural due process claim against the CHA and individual defendants, and on the substantive due process claim against all defendants. The defendants ask for a judgment notwithstanding the verdict and in the alternative for a new trial. This motion is denied. Mr. Hunt asks for further relief under Fed. R. Civ. P. 59(e) in the form of reinstatement or front pay, prejudgment interest, and attorneys' fees and costs. The court declines to order reinstatement, but grants the rest of Mr. Hunt's request.

Defendants first argue that the verdict in favor of Mr. Hunt on his First Amendment claim against the CHA cannot stand, since no individual defendants were found liable on this claim. This argument has no merit. Under *Monell*

v. New York Department of Social Services, 436 U.S. 658 (1978), the doctrine of *respondeat superior* does not apply in § 1983 claims such as Mr. Hunt's, so the CHA's liability was never wholly dependant on the acts of the individual defendants. CHA liability depended on its employment policy, as implemented either by the CHA Board or its delegate. *St. Louis v. Praprotnik*, 485 U.S. 112, 126-27 (1988). The CHA can therefore be liable independently of the individual defendants. *.Pembaur v. Cincinnati*, 475 U.S. 469, 475 (1986).

Defendants next argue that the evidence was insufficient to support the verdict against the CHA on the First Amendment claim. The court disagrees. The testimony regarding the November 23, 1982, December 20, 1982, and January 23, 1983 Board meetings, especially the hostile discussion of Mr. Hunt's criticisms, is enough to support the jury's conclusion that Mr. Hunt's First Amendment rights were violated.

The defendants seek a new trial based on what they allege are inconsistent verdicts. Apparently inconsistent verdicts should be reconciled if it is possible to do so. *Sterling v. Commercial Union, Ins. Inc.*, 674 F.2d 697, 700 (8th Cir. 1982). Although it is a close question, the court believes that the verdict on the First Amendment claim can be reconciled with the verdicts on the retaliatory discharge and contract claims. On the First Amendment claim, the jury was instructed that "plaintiff had a constitutional right to criticize the maintenance and repair of CHA's elevators. . . ." Jury Instruction 15. On the retaliatory discharge claim, the jury was instructed to find in favor of Mr. Hunt "If you find that CHA discharged Hunt in retaliation for activities in furtherance of that policy. . . ." Jury Instruction 18. "That policy" refers to Ill. Rev. Stat. ch. 67-1/2 § 24, and the state policy of providing efficient, decent, safe, and sanitary dwellings

for poor residents. It is thus possible that the jury focused on the phrase "in furtherance of that policy" rather than "retaliation" in Instruction 18, and felt that Mr. Hunt's criticism of CHA's elevator repairs did not further any important public policy. Instruction 18 and *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 421 N.E.2d 876, 881 (1981). For the First Amendment claim, the jury had no freedom to question whether Mr. Hunt's criticism was entitled to First Amendment protection, as their verdict on the retaliatory discharge count indicates they might have. In other words, the jury evidently believed, for both counts, that there had been retaliation against Mr. Hunt. In Count 1, Mr. Hunt won because the jury had been instructed that his speech was protected (by the First Amendment). In Count 2, Mr. Hunt lost because the jury believed his speech was not protected (it did not further a public policy). The verdicts are consistent.

The defendants argue that the verdict for Mr. Hunt on his First Amendment claim is inconsistent with the verdict against him on the contract claim, unless the latter verdict constitutes a finding of no contract. On the contract claim, the jury was instructed that if the CHA fired Mr. Hunt in violation of the First Amendment, then that would constitute a firing without just cause. Instruction 20. However, Instruction 20 went on to say "If you find that CHA fired Hunt for some other reason, you must decide whether that reason constituted 'just cause' or not." Under this instruction, the jury could have believed that the "insubordination" of which the CHA accused Mr. Hunt was "some other reason," which it equated with "just cause" for firing him under the contract. This does not mean that the CHA met its burden of showing for the First Amendment claim "that they would have reached the decision to dismiss Hunt even if Hunt had not criticized CHA." Instruction 14. The verdicts are not inconsistent.

The court rejects defendants' arguments for a judgment notwithstanding the verdict on the due process claims. In the first place, the law of the case, as articulated by the Seventh Circuit when this case was first appealed, compels the conclusion that the jury could find that CHA policies constituted a contract. In the second place, Mr. Hunt presented sufficient evidence to support a finding that there was a contract under *Duldulao v. St. Mary of Nazareth Hospital*, 115 Ill.2d 482, 505 N.E.2d 314 (1987). Finally, there was sufficient evidence to support the verdicts on both the procedural and the substantive due process claims.

The court denies Mr. Hunt's motion for reinstatement and instead grants his request for front pay. From the court's many dealings with the parties, especially in the context of settlement conferences, the court believes that the relationship between Mr. Hunt and the CHA contains too much animosity to make reinstatement appropriate. Accordingly, the court instead awards Mr. Hunt front pay, to which the CHA has not objected. The court also awards Mr. Hunt $76,377 in prejudgment interest. Again, the CHA has not objected either to such an award or to the amount.

Mr. Hunt's petition for attorney's fees and costs is due on October 10, 1990. Defendants' response is due on October 24. There will be a status hearing on September 24, 1990 at 9:30 a.m. to discuss how to proceed on determining the amount of front pay.

E N T E R:

/s/ _____
Ann Claire Williams, Judge
United States District Court

Dated: SEP 11, 1990

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September 14, 1992.

Before
Hon. RICHARD A. POSNER, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

JEROME HUNT,	]	Appeal from the United
	]	States District Court for
Plaintiff-Appellee,	]	the Northern District
	]	of Illinois,
No. 90-3614 v.	]	Eastern Division.
	]	
CHICAGO HOUSING AUTHORITY, a municipal corporation, JAMES GILMARTIN and CHARLES CLARKE,	]	No. 84 C 3564.
	]	Ann Claire Williams,
	]	*Judge.*
	]	
	]	
Defendants-Appellants.	]	

O R D E R

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by defendants-appellants on September 2, 1992, no judge in active service has requested a vote thereon, and all the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby, DENIED.

APPENDIX D

RELEVANT STATUTORY PROVISION

42 U.S.C. § 1983:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

ORIGINAL

No. 92-1002

Supreme Court, U.S.
FILED
JAN 21 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

CHICAGO HOUSING AUTHORITY,

Petitioner,

v.

JEROME HUNT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, the Chicago Housing Authority ("CHA"), asks this Court to decide "[w]hether a local government agency [i.e., CHA] may be liable under 42 U.S.C. § 1983 for discharging an employee [i.e., respondent Jerome Hunt ("Hunt")] in violation of his constitutional rights when the termination was approved by only one member of the [agency's seven-member Board] and ... the other six members were not aware of and did not participate in the decision to discharge the employee." CHA's Petition For A Writ of Certiorari in No. 92-1002 ("Pet." or "petition") at i. But this case does not present that question. See pp. 16-23 infra. Rather, the only question presented by the decision below is:

Did the Seventh Circuit Court of Appeals, in an unpublished order, properly hold that the evidence supported the jury's verdict that a municipal corporation's entire Board of Commissioners was directly responsible for an employee's discharge in violation of his federal constitutional rights?

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STATEMENT

CHA, which is the municipal corporation that manages public housing in Chicago, fired Hunt, who then filed this action, R. 1[1], claiming that the discharge violated his rights under the First and Fourteenth Amendments to the United States Constitution to speak freely (the "free speech claim"), see e.g., Mt. Healthy City School Dist. Board of Education v. Doyle, 429 U.S. 274, 281-87 (1977), and under the procedural and substantive components of the Fourteenth Amendment's due process clause (the "due process claims"). See e.g., Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) (procedural due process claim); Harrah Independent School Dist. v. Martin, 440 U.S. 194, 197-98 (1979) (substantive due process claim).[2]

The case was tried three times and appealed twice. After the first jury returned verdicts in Hunt's favor, District Judge James B. Parsons entered a judgment notwithstanding the verdict ("jnov"). R. 172. Hunt appealed, and in the first of two unpublished decisions, the Court of Appeals for the Seventh Circuit reversed and remanded for a new trial. R. 214, 215. After a mistrial, the third jury rendered verdicts in Hunt's favor on his free speech and due process claims. R. 319. CHA then appealed from the judgment entered on those verdicts seeking either a second jnov or a fourth

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[1] Hunt employs the same citation conventions in this brief that CHA used in its petition, see Pet. at p. 2 n. 1, except that transcripts of the trials prior to the one now under review are identified by the date, e.g., T. of Dec. 6, 1989 at 1, and the parties Stipulation of Uncontested Facts (see R. 357) is identified as "Stip." e.g., Stip. ¶ 1.

[2] Hunt also advanced pendent state law claims, but they are not relevant to CHA's petition. See App. at 2a.

trial. R. 342. In the second unpublished decision, however, the court of appeals affirmed the judgments against CHA. App. at 1a-26a.[3] CHA's petition seeks review of that second decision.

In its Statement, CHA contends that the record establishes that CHA's "seven-member Board did not fire Hunt." Pet. at 3. Rather, according to CHA, the evidence shows that "Hunt was fired by lower-level officials 'with the approval of' only one Board member." Id. (citing App. at 6a) (emphasis in petition). Indeed, CHA goes so far as to contend that "there was no evidence that the other six Board members even knew that Hunt had been fired (let alone evidence that they participated in that decision)...." Id.; see also Pet. at 8, 10, 14, 15 n.7, 16-17 (same).

CHA then links that reading of the record to a holding it ascribes to the court of appeals. In its Statement, CHA says that the "court below held ... that the evidence [that Hunt had been fired by one Board member and CHA's executive director, not by CHA's whole Board] was 'sufficient' ... to impose liability on the CHA." Pet. at 3 (citing App. at 26a). By that reading of the court's decision, CHA can repeatedly assert that the court of appeals upheld "liability based on the acts of a single Board member." Id.; see also id. at 9, 10, 12, 14-16, 22 (same).

But CHA misstates the appellate court's holding and mischaracterizes the record by offering an incomplete description of the

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[3] The court of appeals also reversed judgments against two individual defendants holding that they were entitled to qualified immunity. App. 9a-13a. Hunt has not sought review of that part of the court of appeals' order.

events that led to Hunt's discharge, particularly the Board's participation in the decision to discharge Hunt in retaliation for his criticism of CHA's elevator division. The Statement here corrects those deficiencies. See Sup. Ct. R. 15.1, 24.2.

I. HUNT'S EMPLOYMENT AT CHA

Jerome Hunt has lived in CHA housing since 1966. App. at 2a; Tr. 349. CHA hired Hunt as its Resident Elevator Representative in October 1980. Pl. Ex. 1; Stip. at ¶ 1; Tr. 356. Under the terms of his job description, Hunt had numerous duties. Id.; see also App. at 2a-3a (describing Hunt's other duties, and his performance of his duties). Among other things, he was to serve on the CHA elevator committee, Pl. Ex. 3, a working unit of CHA officials and employees charged with "monitor[ing] all facets of [CHA's] elevator operation...." Pl. Ex. 14. Hunt was to present the views of residents concerning elevator operational problems to the committee. Pl. Ex. 3. But in 1981, after the committee had met about three times, Joseph Bell, the committee's chairman, stopped the committee's meetings. Tr. 58, 248, 371.

Hunt was also to "[a]ssist in formulating a general plan for improvement of elevator conditions and service." Pl. Ex. 3. Hunt therefore assumed responsibility for "putting into order the work tickets and invoices submitted by the elevator repairmen, ... and [keeping] a record of elevators kept out of service,...." App. at 3a. To do that, Hunt devised a form to determine the frequency of elevator breakdowns and the amounts paid to Westinghouse, CHA's elevator contractor. Tr. 361-66; Pl. Ex. 17.

II. HUNT'S CRITICISM OF CHA

As Hunt reviewed Westinghouse's work tickets and the reports of elevator breakdowns, he discovered that the same elevators were out of operation day after day even as Westinghouse billed CHA for many hours of work to repair them. Tr. 378-91, 407-08; Pl. Ex. 18-24, 28, 52 at 46-8, 60. Hunt therefore began to send reports to his supervisors in which he said that CHA was spending millions of dollars for very poor elevator service. Id.; see App. at 3a.

Hunt also attended meetings of CHA's Board of Commissioners to discuss CHA's elevator service. Tr. 368. At the February 24, 1981 Board meeting, Charles Swibel, then the Board's chairman, told Hunt to submit his reports "through channels." Pl. Ex. 50 at 1. When Hunt asked if the Board had seen any of his previous reports, Swibel replied, "I don't know what the nature of these reports were." Id. at 1-2. At the May 12, 1981 Board meeting, after Hunt informed the Board about the continuing problems in elevator service at CHA, Swibel told Hunt: "I resent, on behalf of the Board, that as an employee you have seen fit to come before this Board before giving your superiors and the people that you work for an opportunity to discuss with you and the tenant councils any statement that you might bring to this Board." Pl. Ex. 51 at 34.

In June, 1981, Charles Clarke became Hunt's supervisor. Tr. 35-6. After Hunt sent Clarke a memorandum in which Hunt complained that CHA's elevator service was worsening, Pl. Ex. 24, Clarke removed Hunt from the Central Maintenance office, where he had been working, and required him to work instead at an office in Dearborn

Homes, the housing development where Hunt lived. Pl. Ex. 29; Tr. 60-5, 78, 153-54.

At the September 8, 1981 meeting, Hunt told Swibel and Andrew Mooney, then CHA's executive director, that he (Hunt) could not function under his job description because the elevator committee had stopped meeting and because he was not informed of CHA's plans concerning elevator service. Pl. Ex. 52 at 46. He also told the Board that Westinghouse was "making money while their men are goofing off" and even "trying to sabotage" the repair program. Id. at 47, 53. Then Hunt told the Board that "I have been constantly told by people that you come to the Commissioners, you are going to get fired, Jerome." Id. at 56.

James Simpson, CHA's Director of Maintenance, attended the September 8 Board meeting, and later that day, he ordered Hunt to leave work. Pl. Ex. 22 at 2, Tr. 90-4, 266, 394-6. When Hunt refused, Simpson told Clarke to place Hunt on probation. Id. Clarke did so even though he never placed other employees, even those who had violated his direct orders, on probation. Tr. 94; 114, 136-37, 252. Hunt advised the Board that Clarke and Simpson had put him on probation. Pl. Exs. 22, 53 at 28-9.

At CHA's January 12, 1982 Board meeting, Hunt told the Board that "[w]e still have a very severe problem with the elevator situation. ... Millions of dollars have been spent, and right now millions of dollars are continuing to be spent, and there is absolutely no control by this Board nor by the executive staff over these funds." Pl. Ex. 53 at 28. Hunt also reported that, while

CHA's mechanics lacked the parts to fix the elevators, CHA had "given [parts] to Westinghouse, and Westinghouse is selling them right back to CHA." Id. at 30. Hunt concluded that "all [the elevator repairmen] have to do is go in, sign their name in the morning, then leave for the rest of the day." Id. Mooney then raised his voice and told Hunt that "I finally have gotten tired of you talking to this board this way." Id. at 33.

"Mr. Hunt's charges were not without foundation; the serious inadequacies of CHA management and abuses by the Westinghouse repairmen are discussed in detail in a report prepared by HUD [United States Department of Housing and Urban Development]." App. at 3a n. 2. That report concluded, among other things, that "CHA's program of elevator maintenance is in total chaos," and that "[r]esponsibility for [the elevator maintenance] problem must be shared equally by the CHA and its outside elevator contractor (Westinghouse)." Pl. Ex. 11 at 144.

By the November 23, 1982 Board meeting, Mooney had replaced Swibel as chairman of CHA's Board, and Elmer Beard had replaced Mooney as the Executive Director. Pl. Ex. 54 at 1. At that meeting, Hunt told the Board that he had "written reports on top of reports ... [but t]he elevator situation in public housing has gotten worse under Mr. Mooney's administration," and that "Mr. Mooney has not done anything about [the elevator program]. The

cost is prohibitive, the service is ridiculous. People are dying[4], and people are making money, Mr. Mooney." Id. at 38-40.

On December 10, 1982, Hunt sent a letter to the Secretary of HUD, with copies to CHA's Commissioners, accusing CHA of mismanagement and requesting that HUD investigate CHA. Pl. Ex. 27. Ten days later, on December 20, 1982, the full Board met in executive session to discuss Hunt's employment. Pl. Ex. 56.

III. HUNT'S DISCHARGE

The December 20, 1982 meeting was attended by Mooney, the Board's Chairman, every one of the other six members of the Board, and Beard, CHA's executive director. Pl. Ex. 56 at 2. Shortly after the discussion of Hunt began, Commissioner Finney said, "I have a problem seeing why [Hunt] would come to a [Board] meeting and publicly vent his frustration." Id. at 16. Commissioner Nash suggested that CHA should revise Hunt's job description "or we terminate him." Id. at 17. Finney said that the Board should "not get involved in termination," id., because, as he put it, "I worry about getting involved in these matters." Id. at 19. But he suggested instead that Beard, CHA's executive director, should "take this matter under consideration, to deal with it and get it out of here." Id. at 18. Finney then added that Hunt should be given a new job description "and then ... [i]f he doesn't perform, he should be taken out of the organization." Id. at 19. The full Board then agreed to this suggestion. Id. at 20.

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[4] Residents of CHA's developments had been injured or killed because of faulty elevators. Tr. 405, 702.

In fact, the Board was not concerned about changing Hunt's job description. Hunt himself had asked Clarke for "a complete review of my job description," Pl. Ex. 24 at 2, and Hunt had told the Board that, because the elevator committee had stopped meeting, he had been prevented from fulfilling the duties described in his existing job description. Pl. Ex. 52 at 46. But Hunt was discharged without anyone ever reviewing his job description. Tr. 268-69, 405; see App. 5a ("Apparently nothing was done to revise Mr. Hunt's job description....").

At the same December 20, 1982 meeting at which Hunt's discharge was discussed, the Board hired James Gilmartin as CHA's personnel director. Pl. Ex. 56 at 2-11. A few weeks after the December 20, 1982 meeting, and thus shortly after Gilmartin had arrived at CHA, Mooney directed Gilmartin to convene a "hearing" concerning Hunt. Pl. Ex. 29. Hunt was not informed of this "hearing." Id.; Tr. 122-3, 151, 410-11. But on January 21, 1983, Gilmartin convened a meeting attended by himself, Clarke and three other CHA managers.[5] Id.

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[5] CHA's Statement says that the January 21, 1983 meeting was convened because Michael Davis, one of CHA's housing managers, had complained that Hunt had committed "'several acts of gross insubordination' and had 'harass[ed]' Davis's office." Pet. at 7 (quoting Def. Ex. 32). But CHA may not legitimately press that understanding of the reason for the meeting because when it did so during the second trial, Hunt responded by offering Davis's personnel file to show that the "insubordination" and "harassment" of which Davis complained was that Hunt had reported that Davis was violating CHA policy by conducting a law practice from his CHA office while on CHA's time and that Davis was later discharged from CHA for precisely that conduct. Tr. of December 6, 1989 at 478-82; Pl. Ex. 55. By the third trial, CHA had decided to forego discussing Davis's complaints concerning Hunt, to keep the court from entering Davis's personnel file into evidence. Tr. 674-677.

On January 25, 1983, Gilmartin sent a memorandum to Mooney telling him that the group had discussed Hunt's "negative characteristics ... and it was made clear by those in attendance that something had to be done regarding the future employment of Mr. Jerome Hunt with the CHA." Pl. Ex. 29 at 2. Gilmartin also wrote that termination "would be difficult to implement because of the lack of written documentation supporting the allegations [against Hunt]." Id. Indeed, except for the period during which Simpson and Clarke put Hunt on probation for complaining about the elevators at the September 8, 1981 Board meeting, Hunt's personnel record was spotless. Pl. Exs. 1, 2, 6-10. So Gilmartin recommended to Mooney either that Hunt's position be eliminated or that he be more closely supervised under a revised job description. Pl. Ex. 29 at 3. Finally, Gilmartin wrote that "[i]f Mr. Hunt continues his pattern of insubordination or disruption, he should be placed on probation. If, during the probation period, he continues to act in a disruptive manner he should be terminated." Id.

But CHA never revised Hunt's job description or supervised him differently. Tr. 268-69, 405; see App. 5a. Instead, on January 25, 1983, the same day that Gilmartin sent his memo to Mooney, Clarke requested Hunt's discharge because Hunt had attended another Board meeting to present the residents' grievances concerning elevator service. Pl. Exs. 30, 31, Tr. 101-105, 420-27; see App.

at 6a.[6] Gilmartin forwarded Clarke's recommendation to Mooney with Gilmartin's concurrence that Hunt be terminated. Pl. Ex. 31; Tr. 155.

On February 22, 1983, Harold Washington won the Democratic primary election for Mayor of Chicago, and Hunt won money in the state lottery. Tr. 127-28, 427-9; see App. at 6a. Hunt celebrated that night and came to work drunk the next day. Id. Clarke again requested that Gilmartin fire Hunt and Gilmartin in turn recommended Hunt's discharge to Mooney. Pl. Ex. 34, 35; Tr. 161-2. But Gilmartin admitted that other employees at CHA were not terminated for drinking except for multiple instances of drunkenness or when the drinking "caused a severe problem out in the field." Tr. 162-4.

Each workday morning, Hunt was required to travel to and from his housing development, Dearborn Homes, where Clarke had assigned him to work, and CHA's Central Maintenance office, where the elevator maintenance division was housed, to "sign in" for work. Tr. 60-5, 78, 137, 153-4, 429-35; Pl. Exs. 29 at 2, 37. Then, after completing his workday at Dearborn Homes, Hunt was required to return to Central Maintenance to "sign out." Id. On April 22

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[6] Clarke claimed that Hunt's conduct violated CHA's "policy" prohibiting employees from attending Board meetings on company time. But Clarke had neither seen this "policy" in writing, nor did he know where he had learned of it. Tr. 105-12. Moreover, he was inconsistent as to whether Hunt had ever violated this "policy" before January 25, 1983. Compare Tr. 108 with Tr. 227-29. In any event, Hunt not only testified at trial, but also maintained at the time, that he took leave time from work whenever he attended Board meetings, including the January 25, 1983 meeting. Tr. 423; Pl. Exs. 22 at 2, 52 at 45, 53 at 29.

and 25, 1983, Hunt worked late at Dearborn Homes, and when he returned to Central Maintenance just shortly after the office had officially closed, he was not permitted to sign out. Id.

On April 26, 1983, Clarke, who knew that Hunt had worked two full days on April 22 and 25, 1983, nonetheless notified Hunt that he would be docked two days' pay for failing to sign out on those days. Id.; see App. at 6a. In the conversation that ensued, Hunt said that Clarke knew Hunt had worked that day and that Clarke was a "damned liar" for suggesting otherwise. Id. That day, after Hunt returned from a Board meeting, Clarke suspended him pending termination. Id.

Clarke later admitted that other employees had sometimes neglected to sign out and even disobeyed his direct orders, but that he neither disciplined anyone else for such conduct nor discharged anyone other than Hunt during his tenure as manager of the elevator division. Tr. 114, 136-37, 251-52. And though Gilmartin later described neglecting to sign out as a "minor infraction," Tr. 166, he again recommended Hunt's discharge based on Clarke's request. Pl. Ex. 39; Tr. 141-2, 195-97.

According to Gilmartin, "[t]he chairman [of CHA's Board] would ... present to the board ... all personnel actions ... [including] terminations" for its approval. Tr. 141. On May 18, 1983, Mooney notified Gilmartin that "Mr. Beard and I agree with your recommendation [that Hunt be fired]." Pl. Ex. 40, Tr. 142. Gilmartin thereafter sent Hunt "official notification ... that your separation will be effective April 27, 1983." Pl. Ex. 41.

At Hunt's request, CHA convened a hearing regarding the propriety of his termination, but not until June 8, 1983, six weeks after the effective date of Hunt's discharge. Pl. Exs. 33, 38, 41, 42; Tr. 120, 150, 160, 168. Gilmartin presided at the hearing and told Hunt that he was discharged solely for the events of April 22 and 25, 1983. Pl. Ex. 42, 43; Tr. 194-5, 213-14. After the hearing, however, but before Gilmartin rendered his decision, Clarke told Gilmartin that Hunt "was constantly writing memos and constantly berating the entire system from the chairman of the board of directors right on down to Charlie Clarke." Tr. 144-5, 171-3. On June 14, 1983, Gilmartin notified Hunt that "[w]e ... have concluded that your termination was for just cause and in compliance with current CHA policies and procedures." Pl. Ex. 43.

IV. THE DISTRICT COURT'S JURY INSTRUCTIONS AND THE COURT OF APPEALS' DECISION

With regard to CHA's liability, the district court instructed the jury, in relevant part, that CHA:

> is a municipal corporation. Under Illinois law, CHA's board of commissioners is charged with the duty to make CHA's policy as to discharge of employees. To find CHA liable on Hunt's [constitutional claims], you must find CHA's Board responsible for the unlawful conduct.
>
> * * *
>
> If Hunt has merely shown that the CHA board failed to investigate the basis for his discharge ... you should find in favor of CHA on [the] free speech claim....

Tr. at 886-87, 899-900, 903-05; R. 321; App. 15a. Thus, as CHA concedes: 1) "the jury was instructed ... that ... CHA's final policymaker under Illinois law was its seven-member Board," Pet. at 14 (citations omitted), see e.g., Jett v. Dallas Independent School District, 491 U.S. 701, 737 (1989) (a municipal corporation can be

liable under § 1983 only if those with final policymaking authority under state law caused the deprivation of rights); Parker v. Chicago Housing Authority, 730 F. Supp. 115, 119-120 (N.D. Ill. 1989) (under Illinois law, CHA's Board has final policymaking authority for employment decisions); and 2) "the jury was instructed correctly that there must have been evidence that 'the board decided to discharge Hunt' in violation of his constitutional rights." Pet. at 9 (citations omitted); see Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986) ("recovery from a municipality is limited to ... acts which the municipality officially sanctioned or ordered.").

Once the district judge instructed the jury that only CHA's Board "ha[d] the power to make official policy on ... [employment] issue[s]..., it [was] for the jury to determine whether ... [the Board's] decisions ... caused the deprivation of [Hunt's] rights." See Jett, 491 U.S. at 737. Thus, the jury's verdicts against CHA on the constitutional claims mean that the jury found that CHA's whole Board (not just a single Board member) was, indeed, "directly responsible" for the deprivation of Hunt's constitutional rights.

The court of appeals (Posner, Ripple, Manion, JJ) affirmed the judgments against CHA concluding that the "evidence, viewed in the light most favorable to Mr. Hunt, was sufficient to support the jury's verdicts [as to each of the constitutional claims]." App. at 26a.

REASONS WHY THE PETITION SHOULD BE DENIED

CHA contends that the court of appeals upheld "liability [against CHA] based on the acts of a single Board member." Pet. at 3; see p. 16 n. 9 infra (citing numerous reiterations of this contention in Petition). This contention is, in turn, the predicate for each of the three reasons CHA offers for granting the petition: 1) that "the court of appeals' holding that municipal liability may be based on the conduct of one member of a seven member Board is ... inconsistent with Monell [v. New York City Dep't of Social Services, 436 U.S. 658 (1978)] and its progeny." Pet. at 12, see id. at 12-17; 2) that "the circuits are divided on whether the conduct of one member of a policymaking board can subject a municipality to § 1983 liability," id. at 18, see id. at 18-20; and 3) that the question of whether one member of a policymaking board can subject a municipality to § 1983 liability is, in any event, "a recurring and important issue." Id. at 20, see id. at 20-22.

Regardless of whether the question CHA presents would be "important" enough to merit this Court's plenary consideration in an appropriate case if the circuits were truly split on the issue, neither the court of appeals' decision nor the record raises that question. See § I, infra. And the circuit conflict CHA posits

simply does not exist. See § II, infra.[7] Rather, CHA's petition is just a plea that this Court review an unpublished appellate decision holding that, under a settled and undisputed standard for finding municipal liability under § 1983, there was sufficient evidence to support the jury's verdict that CHA unlawfully discharged Hunt. Such a plea is plainly insufficient. See United States v. Johnson, 268 U.S. 220, 227 (1925).[8]

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[7] Since there is no split in the circuits as to whether one member of a policymaking board can subject a municipality to § 1983 liability, the issue CHA posits does not, in any event, appear to be "recurring." See Pet. at 20. Moreover, no matter how "important" CHA's question might be in the abstract, the idea that the court of appeals' particular decision here has great "practical significance," Pet. at 22, because it could somehow have a "profound and adverse [financial] impact on local government agencies," id. at 20, is surely wrong.

The decision is unpublished. App. at 1a. And, under Rule 53 of the Circuit Rules for the Court of Appeals for the Seventh Circuit ("Circuit Rule 53"), an unpublished Seventh Circuit order "[e]xcept to support a claim of res judicata, collateral estoppel or law of the case, shall not be cited or used as precedent." Id. at (b)(2)(iv) (emphasis supplied). Thus, other municipal corporations know that the court of appeals' decision will not be cited as a basis for upholding a municipality's liability in another case.

[8] The petition is also an inartful attempt to overcome the daunting standard for review of jury verdicts to which CHA succumbed in the court of appeals. See App. at 25a ("In determining whether the evidence to support the verdict, we take the evidence and all reasonable inferences from it in the light most favorable to the party winning the verdict.") (citations omitted). Indeed, it appears that, bereft of any legitimate basis for seeking the writ, CHA rummaged about the case law for a § 1983 question that might arguably be "important" enough to merit this Court's review, and then sought, by tortured readings of both the court of appeals' decision and the record, and by manufacturing a circuit conflict, to present that question in its petition.

I. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION PRESENTED IN THE PETITION

A. CHA invokes a single clause in the court of appeals' lengthy order ("After Mr. Hunt was terminated with the approval of Chairman Mooney and the Executive Director,...", App. at 6a) to contend that when that court upheld the jury's finding that "CHA was directly responsible for firing Mr. Hunt," App. at 18a, it thereby upheld a jury verdict that "impose[d] liability on the CHA ... based on the acts of a single Board member...." Pet. at 3.[9] The question it asks this Court to review depends upon that contention. Pet. at i; see p. 14 supra. But the court of appeals did not uphold a verdict finding that Hunt was fired "by lower-level officials 'with the approval of' only one Board member." Pet. at 3 (emphasis in Petition, citation omitted).

The court of appeals' observation that "Hunt was terminated with the approval of Chairman Mooney and the Executive Director", App. at 6a, is, of course, true: Mooney and Beard did authorize Hunt's discharge. Pl. Ex. 40, Tr. 142. But that does not mean that the court concluded that only Mooney and Beard, and not CHA's Board acting collectively, had caused the constitutional deprivation. Nor does it mean that the jury predicated its verdict upon a determination that the full Board had not "officially sanctioned or ordered," Pembaur, 475 U.S. at 480, Hunt's discharge.

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[9] CHA's repeated assertion that the court of appeals upheld "liability based on the acts of a single Board member," Pet. at 3; see id. at 9, 10, 12, 14-16, 22, is accompanied by no citation other than the single sentence fragment that appears at p. 6a in the appendix.

The court of appeals noted Mooney and Beard's "approval" of the termination only after it had reviewed the evidence of the whole Board's culpability. App. at 2a-7a.[10] More importantly, the court of appeals was clearly of the view that, under settled law (as properly set forth in the jury instructions), for CHA to be liable for firing Hunt, CHA's Board of Commissioners itself (not simply an individual Board member) must have been directly responsible for the termination. See App. at 18a n. 8 ("In the present case, the district court properly decided ... [the] issue ... [of] the identity of those officials to whom state law has delegated policy-making authority.") (emphasis added); id. at 15a (quoting district court's jury instruction that "[u]nder Illinois law, CHA's board of commissioners is charged with the duty to make CHA's policy as to discharge of employees. To find CHA liable on Hunt's free speech claim, you must find CHA's board responsible for the unlawful conduct.") (emphasis added); see also, App. at 15a-19a (approving this instruction).

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[10] In particular, the court noted that the former chairman of CHA's Board, Charles Swibel, had "expressed displeasure at Mr. Hunt's voicing his criticisms in public," and that Mooney, who would later become chairman of CHA's Board, "told Mr. Hunt ... 'I finally have gotten tired of you talking to this board this way.'" Id. at 3a-4a (quoting Pl. Ex. 53 at 28). Moreover, the court of appeals reviewed the transcript of the Board's December 20, 1982 meeting in depth. It quoted Commissioner Finney's expression of dissatisfaction that Hunt would "come to a [Board] meeting and publicly vent his frustration," App. 4a (quoting Pl. Ex. 56 at 16), and Finney's statement that Hunt should be "taken out of the organization." Id. at 5a (quoting Pl. Ex. 56 at 19). And while the court noted that the Commissioners had discussed revising Hunt's job description, it also recognized that, in fact, "nothing was done to revise Mr. Hunt's job description" before he was discharged. Id. at 5a.

CHA's reading of the court of appeals' decision cannot be squared with the text of that decision, particularly that court's expressed understanding of the law. Since the court of appeals approved the jury's verdict specifically because the jury instructions properly told the jurors that they could find CHA liable only if "CHA's board of commissioners [itself was] responsible for the unlawful conduct," App. at 15a, it is inconceivable that the court then read the jury's verdict as finding liability based on Mooney's acts alone.[11] Indeed, the court of appeals unequivocally said that "[t]here is no realistic possibility that the jury based the CHA's liability ... on the theories that it merely approved the discharge or that it delegated its policymaking authority ...," App. at 17a (emphasis supplied), and that "it [is] extremely doubtful that ... [the] verdicts against CHA on ... [the] due process claims were based on a theory of derivative liability." Id. at 18a.

Since the court of appeals' decision affirmed a verdict finding that CHA's whole "board of commissioners [was] responsible for the unlawful conduct," App. at 15a, there was no occasion for

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[11] This understanding of the court of appeals' decision follows not only from the text of the opinion and the jury instructions, but also from Hunt's litigation position. As CHA concedes, "Hunt argued in the court of appeals that the judgment against the CHA could be sustained because the Board itself decided to fire Hunt at the Board meeting held on December 20, 1982." Pet. at 15 n. 7. CHA's reading of the decision below is, therefore, that the court of appeals approved a jury verdict that was in conflict not only with that court's clearly expressed view of the law (as properly set forth in the jury instructions), but also with the appellee's argument as to the implication of the facts and the law.

the court of appeals even to address the question of whether "the conduct of one member of a policymaking board can subject a municipality to § 1983 liability." Pet. at 18 (emphasis supplied). And that being so, CHA does not advance its position by its repeated complaint that the court of appeals did not "attempt to explain its ... decision," Pet. at 10, regarding § 1983 liability based on the acts of one Board member. See also, id. at 3 ("the court below held - without explanation - that the evidence was 'sufficient.'") (citation omitted). The court of appeals explained no such holding because it rendered no such holding.

B. As the text of the court of appeals' decision decisively rebuffs CHA's reading of it, so the record rebuffs CHA's contention that "there was no evidence that the other six Board members even knew that Hunt had been fired (let alone evidence that they participated in that decision)...." Pet. at 3. Indeed, though CHA claims not to see the evidence on which the jury relied, the court of appeals "examined the record thoroughly" and was thereby "convinced that, ... [t]he evidence ... was sufficient to support the jury's verdicts both on the First Amendment claim and the due process claims, and, therefore, the district court's denial of judgment notwithstanding the verdict was correct." App. 25a-26a.

CHA "may be held liable under § 1983 ... for 'acts ... which [its Board of Commissioners] ... officially sanctioned or ordered." City of St. Louis v. Prapotnik, 485 U.S. 112, 123 (1988) (quoting Pembaur, 475 U.S. at 480). There are two possible bases on which the jury could have concluded that CHA's Board sanctioned or

ordered Hunt's discharge because of his criticism of CHA's poor elevator maintenance.

First, CHA's personnel director Gilmartin testified that discharges at CHA began with a request from a division manager to Gilmartin who would then recommend dismissal to the Board through its chairman or the executive director. Tr. 141-3. And, in this particular case, Clarke requested Hunt's discharge; Gilmartin then recommended it to Mooney, the chairman of CHA's Board; and Gilmartin later received a note from Mooney specifically approving that recommendation. Id.; Pl. Exs. 37, 39, 40. Despite CHA's assertion that "Hunt's termination was not ... approved by 'the full board,'" Pet. at 7-8 (citation omitted), there was no evidence whatsoever to suggest that Hunt's case was an exception to the rule of Board approval. The jury was, therefore, free to conclude that since Hunt's discharge otherwise followed the normal process, CHA's Board approved the discharge.

In any event, the evidence supports the conclusion that CHA's full Board "officially sanctioned or ordered," Pembaur, 475 U.S. at 480, Hunt's discharge at the December 20, 1982 meeting.[12] See pp. 7-8 supra. True, because the Commissioners were too "worried" to fire Hunt themselves, they did not explicitly order Hunt's discharge at that meeting. But they directed Beard to "take this matter under consideration, deal with it, and get it out of here."

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[12] That being so, there would have been no reason for the jury to have considered whether the full Board approved Hunt's discharge again after Gilmartin's April 26, 1983 recommendation.

P.Ex. 56 at 18 (emphasis supplied). To distance themselves from the decision to discharge Hunt, the Board recommended that Beard change Hunt's job description "and then, if he doesn't perform, he should be taken out of the organization." Id. at 19. But the jury surely concluded that the idea of revising Hunt's job description was a ploy, since Hunt was fired without any review of his job description even though he himself had asked for such a review. Pl. Exs. 24 at 2, 52 at 46; Tr. 268-69; see App. 5a ("Apparently nothing was done to revise Mr. Hunt's job description....").

Moreover, the record supports the court of appeals' conclusion that CHA's Board had not "merely approved [Hunt's] discharge," App. at 17a, but that it wanted Hunt "out of [CHA]" because it wanted to silence his criticism of CHA. Members of the Board had angrily challenged Hunt's right "to come before [the] Board," Pl. Ex. 51 at 34, to criticize CHA's inadequate elevator maintenance. See pp. 4-7 supra. Moreover, at the outset of the December 20, 1982 meeting, as the Board began to consider whether to discharge Hunt, Commissioner Finney said, "I have a problem seeing why [Hunt] would come to a Board meeting and publicly vent his frustration." Pl. Ex. 56 at 16. And none of the other Commissioners took issue with Finney. Id.

Indeed, the evidence supported the jury's finding that the Board's December 20, 1982 conversation about Hunt was a ruse designed at once to tell Mooney and Beard that the Commissioners wanted Hunt "taken out of the organization" for "com[ing] to [Board] meeting[s] and publicly vent[ing] his frustration" but, at

the same time, to give CHA a basis to try to deny responsibility or that decision - as it still does now in its petition.[13] CHA's argument to the contrary is a contention that a municipality's policymaking Board can violate someone's constitutional rights without subjecting the municipality to § 1983 liability by urging

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[13] While all three verdicts can be supported by either of the theories described above, the procedural due process verdict can also be affirmed because CHA's personnel policies limit discharges to instances of "just cause," Pl. Ex. 46 ¶ 2622, thus giving CHA's employees a property interest in their employment. See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538-41 (1985). Yet Gilmartin admitted that "CHA generally [did not] conduct hearings regarding termination of employment." Tr. 149-50. Thus, CHA had a custom or usage of denying hearings before discharging tenured employees. See id., at 542-48.

CHA argues that "[t]here was absolutely no evidence that the Board knew that Gilmartin ... did not hold pretermination hearings...." Pet. at 9 n. 6. But by proving a custom or usage, "[a] § 1983 plaintiff ... may be able to recover from a municipality without adducing evidence of an affirmative decision by policymakers...." Pembaur, 475 U.S. at 481 n. 10 (plurality opinion); see, Monell, 436 U.S. at 690-91 (a municipality can be liable for an unconstitutional custom "even though such a custom has not received formal approval through the body's official decisionmaking channels."). And, in any event, since the Board reviewed all of Gilmartin's discharge recommendations and none showed a pretermination hearing, Tr. 141, it was reasonable for the jury to conclude that the Board itself acquiesced in the custom of discharging employees without such hearings.

CHA also argues that "there was no evidence that the number of employees who had not received pretermination hearings, or the length of time during which hearings purportedly did not occur, was great enough to constitute a ... 'custom or usage.'" Pet. at 9 n. 6 (citation omitted). But during Gilmartin's tenure as personnel director from late in 1982 until July of 1984, CHA employed approximately 2500 people, yet there were only two termination hearings, one of which was Hunt's post-termination hearing. Tr. 140, 149-50. To prove a custom or usage, "[t]he frequency and pattern of the practice ... [need only be] sufficient to give rise to a reasonable inference that the public employer and its employees are aware that the public employees engage in the practice ... with impunity." Cosby v. Ward, 843 F.2d 967, 983 (7th Cir. 1988) (quoting Webster v. City of Houston, 689 F.2d 1220, 1226 (5th Cir. 1982) (citations omitted)).

a subordinate to commit the unlawful act (and to concoct a pretextual reason to "justify" that conduct) so long as the Board never expressly orders the subordinate to do so. Were that the law, § 1983 liability would turn on whether the municipality's policymakers were astute enough to know how to wink and how to nod.[14]

II. THE CIRCUITS ARE NOT DIVIDED ON WHETHER THE ISOLATED ACTS OF ONE MEMBER OF A POLICYMAKING BOARD CAN SUBJECT A MUNICIPALITY TO § 1983 LIABILITY

CHA purports to rely upon a conflict between the Eighth Circuit and the Seventh Circuit below on the one hand, and the Fourth, Fifth and Ninth Circuits on the other. Pet. at 18-20. According to CHA, the Eighth Circuit, like the court below, is of the view that one member of a municipal policymaking body can subject the municipality to § 1983 liability; while the Fourth,

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[14] In the same vein, CHA contends (albeit not very vigorously) that it cannot be liable because its written personnel policies require adherence to federal law and recognize the rights of employees to disagree with CHA's Board. See Pet. at 6 n. 3 and 10-11. Indeed, in presenting its question, CHA formulates the even broader assertion that "discharging an employee in violation of his constitutional rights ... was in contravention of [CHA's] official agency policy." Pet. at i.

CHA's conclusory assertion that it had a policy prohibiting unconstitutional discharges is entirely question begging, since whether CHA's policymakers fired Hunt is precisely the question at issue and the court of appeals upheld the jury's finding that those policymakers (i.e., CHA's Board) did fire Hunt for unconstitutional reasons. And as to the narrower point (that CHA cannot be liable because its personnel policies require adherence to federal law and permit employees to disagree with CHA's Board), it is understandable that CHA does not press it vigorously, since "precatory admonition[s] against ... [an unlawful] employment practice ... [do not] insulate[] ... municipalit[ies] from ... liability based on acts inconsistent with that policy." Prapotnik, 485 U.S. at 130-31 (quoting id. at 145 n. 7 (Brennan, J. concurring)).

Fifth, and Ninth Circuits are of the view that a single member can not do so. Id. As respondent has previously explained, however, the court below did not even address the question of whether one member of a policymaking body can subject a municipality to liability. See Section I.A. supra. Accordingly, if there is a circuit conflict respecting the question CHA raises, the Seventh Circuit is not part of the split and, therefore, the question CHA posits cannot be resolved by issuing a writ of certiorari in this case.

In any event, however, no such conflict exists. CHA's contention to the contrary betrays its confusion between two methods of proving that a municipality is liable under § 1983 when no express municipal enactment (e.g. ordinance, rule, regulation) confirms the existence of an unconstitutional policy. The first method of proof is used when a plaintiff alleges that one or a few isolated decisions were undertaken by those officials in the municipal corporation who have final authority, as confirmed by state law, to make the relevant policy decisions for the agency. See e.g., Prapotnik, 485 U.S. at 114, 121-27; Pembaur, 475 U.S. at 471, 477-84.

The decisions that CHA invokes to establish one side of the supposed "split" simply illustrate of such "isolated acts" cases, in which the plaintiff must show that the acts were undertaken by those officials in the municipal corporation who have final policymaking authority--not, for example, by one member of a multi-member policymaking board if the single member is without authority

under state law unilaterally to establish policy. Collinson v. Gott, 895 F. 2d. 994, 1004 (4th Cir. 1990) (absent "evidence ... that the Board embraced any policy of silencing citizens at public hearings, or that it directly or by knowing inaction condoned [the Board president's] conduct [of evicting a citizen who was trying to speak at a public meeting, the Board president's] ... isolated act [cannot] be considered an exercise of policymaking power by one empowered to 'make policy' for the county in the matter at issue.") (citations omitted; emphasis supplied); Worsham v. City of Pasadena, 881 F. 2d. 1336, 1339-41 (5th Cir. 1989) (after reviewing "Supreme Court ... cases ... involving isolated acts by governmental employees," the court of appeals held that the Mayor's and Public Works Director's "single act" of suspending the plaintiff from his government job was not the act of the municipality because the City Council had the power to hear appeals from suspensions and reinstated the plaintiff pursuant to that power) (emphasis supplied); Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 841 F. 2d 872, 878-79 (9th Cir. 1988) (the single act of one member of a county's board of supervisors who voted on a measure despite a conflict of interest, did not thereby subject the county to § 1983 liability when the county's general policy required disqualification whenever a conflict exists, state law required a majority vote of the board to establish official policy, and the board's general policy regarding conflicts had been

established by a unanimous vote).[15]

The second method of proving municipal liability when there is no written enactment confirming the existence of an unconstitutional policy is used, not when isolated acts are at issue, but when the plaintiff alleges that enough repeated instances of unlawful conduct prove the existence of a municipal custom or usage "so permanent and well-settled ... as to ... [have] the force of law." Monell, 436 U.S. at 691 (quoting Adickes v. S. H. Kress & Co., 398 U.S. 144, 167-68 (1970)); see Prapotnik, 485 U.S. at 127 (describing this "separate doctrine" for establishing a municipality's § 1983 liability by proving a custom or usage).

Harris v. City of Pagedale, 821 F.2d 499, 504-07 (8th Cir. 1987), which CHA invokes to establish the other side of the alleged split, illustrates such a "custom or usage" case. See id. at 506 ("evidence ... [that] clearly establishes that there was a pattern

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[15] CHA also cites two district court decisions and one state supreme court decision for the same side of the purported "split." Pet. at 19 n. 10 (citing Payung v. Williamson, 747 F. Supp. 705, 708-09 (M.D. Ga. 1990) (the single act of a Mayor, who was also one of the seven members of city council and who discharged the plaintiff from a government position, did not create municipal policy when the Mayor's "employment decisions were, by the very terms of the city's personnel ordinance, constrained by the review and appeals process of the City Council."); Young v. Peoria Housing Authority, 479 F. Supp. 1093, 1097 (C.D. Ill. 1979) (the single failure of one member of a municipality's Board of Commissioners to notify the plaintiff of the reasons for her discharge, which violated the whole Board's understanding that the notice would be given, did not establish a municipal policy of denying such notice in violation of plaintiff's due process rights); Todd v. Smith, 407 S.E.2d 644, 647 (S.C. 1991) ("The acts of [the city manager and the director of the city's convention center] ... involving a decision on how to handle a situation which has arisen ... only once in the entire history of Myrtle Beach ... cannot be translated as the acts of the city council or the City of Myrtle Beach.") (emphasis supplied)).

of sexual misconduct by City police officers, ... that on repeated occasions City officials in positions of authority and responsibility were notified of the offensive acts, but that upon receiving such notice, these City officials repeatedly failed to take any remedial action ... proved the existence of a municipal custom sufficient to support municipal liability under § 1983.") (emphasis supplied).

Unlike "isolated act" cases, however, a municipality can be liable for an unconstitutional custom "even though such a custom has not received formal approval through the body's official decisionmaking channels." Monell, 436 U.S. at 690-91 (emphasis supplied). "A § 1983 plaintiff thus may be able to recover from a municipality without adducing evidence of an affirmative decision by policymakers." Pembaur, 475 U.S. at 481 n. 10 (plurality opinion). Since Harris is a case about unlawful municipal customs, it says nothing about whether a single member of a policymaking board can subject a municipality to liability for isolated acts.[16]

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[16] After the Harris court held that the repeated acts were sufficient to prove the municipality's liability because of an unlawful custom, 821 F.2d at 504-05, it went on to consider whether the "members of the Board of Aldermen and the Chief of Police had the final policymaking authority to establish the municipal custom alleged." Id. at 506. But that discussion is dicta since, by proving a municipal custom, a plaintiff need not show that the "custom ... received formal approval through the [municipality's] official decisionmaking channels." Monell, 436 U.S. at 690-91. See Harris, 821 F.2d at 506 ("By definition, custom is unofficial, that is, a course of conduct that has not been approved through formal policymaking channels.").

(Footnote continued on the following page)

Of the five federal appellate decisions CHA cites as establishing a "split," the decision in Harris was the first in time and, according to CHA, it was the only case on one side of the split until the Seventh Circuit's ruling below. App. 18-19. In that context, if CHA's reading of the court of appeals' holding below is correct, and the split it describes exists, then one would have expected that the courts in Collinson, Worsham, Lake Nacimiento Ranch Co. and the panel below would have cited Harris and acknowledged that split. Yet none of those courts did so.

Indeed none of the appellate cases upon which CHA relies cite any of the other cases that, according to CHA, are part of the "split." So far as the decision below is concerned, that is

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16 (cont'd):

Even if one reads that portion of the opinion as essential, however, the Harris court did not hold that when a state's law makes a municipality's board responsible for making policy, the isolated acts of one member of such a board could subject the municipality to § 1983 liability. At most, it held that "the Board of Aldermen, as a whole, or its members individually, as well as the Chief of Police, ... had the final policymaking authority to establish a municipal custom of deliberate indifference to a known pattern of unconstitutional police misconduct." Id. at 507. To the extent that the inaction of municipal officials may make a city liable for a custom of unlawful deliberate indifference, the court's language is no more than a holding that, as a matter of Missouri law, the city's individual aldermen and its Chief of Police, not the Board as a whole, were the relevant officials.

Thus, CHA's quarrel with Harris is reduced to a disagreement about Missouri municipal law, hardly a basis for issuance of the writ CHA seeks. And whether or not the Harris court properly discerned that body of law, no holding on the issue of who has sufficient "authority to establish a municipal custom" in Missouri, id. at 507, could create a circuit conflict on the question CHA raises: when a state's law confirms that a Board of Commissioners has final authority to establish municipal policy, can the isolated acts of one Commissioner establish the existence of a policy that can subject the municipality to § 1983 liability?

because the panel did not even address the question as to which CHA says there is a split. See Section I supra. But the reason no appellate court saw CHA's "split" is because that "split" is the product of CHA's own wishful thinking and the exigencies of litigation, not the product of appellate decisions.[17]

CONCLUSION

CHA's petition should be denied.

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Dated: January 21, 1993

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[17] See also Circuit Rule 53(c) under which the Seventh Circuit publishes any decision that, among other things, "criticizes or questions existing law," or "creat[es] a conflict in the law." Yet the court of appeals did not publish its order in this case. App. at 1a. Accordingly, unless this Court assumes that the appellate panel knowingly transgressed its own rule, it is apparent that the panel did not see the circuit conflict CHA describes or, assuming it did perceive that conflict, it concluded that, since it was not addressing the question as to which there is a conflict, its decision did not implicate, much less, "deepen," Pet. at 18, that conflict.

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January 21, 1993

Mr. William K. Suter, Clerk
United States Supreme Court
Supreme Court Building
Washington, DC 20543

Dear Mr. Suter:

Enclosed please find the originals and one copy each of Respondent's Motion For Leave To Proceed In Forma Pauperis, Affidavit In Support Of Jerome Hunt's Motion To Appear As Respondent In Forma Pauperis, and Cetificate of Service. Also enclosed you will find the original and fourteen copies of Brief In Opposition To Petition For Writ Of Certiorari. Please return in the self-addressed, stamped envelope two stamped copies of the brief.

Thank you.

Very truly yours,

Jeffrey B. Gilbert
Attorney at Law

JBG:skp

Encs.

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No. 92-1002

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

CHICAGO HOUSING AUTHORITY,

Petitioner,

v.

JEROME HUNT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

CERTIFICATE OF SERVICE

Jeffrey B. Gilbert, respondent's counsel of record, certifies that he had three copies of each of Respondent's Brief in Opposition to Petition for Certiorari, Respondent's Motion for Leave to File In Forma Pauperis, and Affidavit in Support of Respondent's Motion to Appear as Respondent In Forma Pauperis, served by hand delivery on January 21, 1993 to each of the following addresses:

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No. 92-1002

IN THE

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PETITIONER

v.

JEROME HUNT,
RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONERS

Hunt does not seriously contest the importance of the question presented in the petition. Rather, the principal thrust of his opposition is that this case does not involve the issue whether municipal liability may be imposed under § 1983 because of the conduct of only one member of a multi-member policymaking board; Hunt contends that the full CHA Board ordered his discharge, not just Chairman Mooney. Tellingly, however, Hunt cannot point to a single piece of evidence directly supporting his argument. That is because there was no such evidence. Thus, Hunt is reduced to speculating (Br. in Opp. 21) about whether the Board's explicit decision on December 20, 1982 to give him another chance under a revised job description was a "ruse." That is a theory that Hunt did not argue to the jury, that is unsupported by the record and that the court of appeals did not accept. Notwithstanding Hunt's baseless conjecture, it is clear from the record that the full Board did not fire him; as the court of appeals acknowledged, "Mr. Hunt was terminated with the approval of Chairman Mooney and the Executive Director" in May 1983. Pet. App. 6a; see also Pl. Exs. 40-41.

Thus, this case squarely presents the issue stated in the petition: the evidence at trial established unequivocally that Hunt's discharge was approved by only one member (Mooney) of a seven-member Board—without the knowledge or participation of the other six Board members. The Seventh Circuit's decision to impose liability in these circumstances is directly contrary to this Court's precedent and conflicts with decisions in other circuits.

I. HUNT WAS DISCHARGED BY ONE MEMBER OF THE CHA'S BOARD, NOT BY THE FULL BOARD.

Hunt offers two theories to support his argument that the entire seven-member Board ordered his termination: (1) the Board decided to terminate him at its December 20, 1982 meeting, or (2) the Board approved his discharge when it actually occurred, in May 1983. See Br. in Opp. 19-23. There is no evidentiary support for either hypothesis, and both are inconsistent with the decision of the court of appeals.

A. The Board Did Not Decide To Discharge Hunt On December 20, 1982. Hunt admits (Br. in Opp. 20) that the Board "did not explicitly order Hunt's discharge at [the December 20] meeting." In fact, despite his truncated summary of what occurred at the December 20 meeting, Hunt concedes (Br. in Opp. 7) that the full Board agreed at that meeting that he should be given a new job description and a chance to perform under that description, and that any future decisions about his employment would be made solely by Executive Director Beard, who was not a member of the Board. See also Pet. 5-6 (discussing this meeting in more detail). Furthermore, Hunt does not dispute that the Board admonished Beard to "'follow the personnel policies'" in handling Hunt's future employment under the revised job description. *Id.* at 6 (quoting Pl. Ex. 56, p. 20).

Nonetheless, Hunt contends that the entire Board "'officially sanctioned or ordered' * * * Hunt's discharge at the December 20, 1982 meeting" (Br. in Opp. 20), because the Board's express conclusions about Hunt were a "ruse" and a "ploy" (*id.* at 21). In other words, the Board's clearly stated decision *not to fire* Hunt can be interpreted as an order *to fire* Hunt. Such an unfounded interpretation turns both logic and the English language upside down.

It would be bizarre, to say the least, if the stringent standards for imposing § 1983 liability on municipalities could be satisfied by evidence that the final policymakers decided *not* to discharge an employee. If inferences like Hunt suggests were permissible, a § 1983 plaintiff could "establish municipal liability without submitting proof of a single action taken by a municipal policymaker." *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 821 (1985) (plurality opinion). That has never been the law. Rather, this Court has stressed that "'municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives' by city policymakers." *City of Canton* v. *Harris*, 489 U.S. 378, 389 (1989) (quoting *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion)). A "deliberate choice" by municipal policymakers to violate someone's constitutional rights cannot be established by proof that the policymakers did *not* make

that choice and instead directed a lower-level official to take *different* action.[1]

Nor is Hunt's "ruse" theory supported by the fact that, contrary to the Board's explicit orders, Executive Director Beard did not revise Hunt's job description. See Br. in Opp. 8, 21. The Board's instructions to Beard were crystal clear: he was to "revise the [job] description," give Hunt "a period of time to conform to that job description" and "follow the personnel policies" in exercising his discretion to make future decisions concerning Hunt's employment. Pl. Ex. 56, pp. 19-20. The Board can hardly be faulted for Beard's failure to follow its explicit orders. A local government agency cannot be charged with § 1983 liability when a subordinate official does not comply with the direct orders of the agency's final policymakers. See *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion); *Pembaur*, 475 U.S. at 483 n.12 (plurality opinion).

Hunt's references to "the jury's finding" that the Board's statements at the December 20 meeting were part of an elaborate "ruse" or "ploy" (Br. in Opp. 21) ring especially hollow: Hunt's counsel *never even mentioned the December 20 meeting during closing arguments* to the jury. See Tr. 780-811, 858-73. Hunt's closing argument concentrated on the liability of the individual defendants; his counsel discussed the CHA's liability only briefly, and even then he focused on *Mooney's* conduct. See Tr. 802-04. It was not until the case reached the court of appeals that Hunt advanced his tortured reading of the Board's December 20 order to Executive Director Beard. The court of appeals did not accept

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[1] Hunt attempts to mask the lack of evidence supporting his argument about the December 20, 1982 meeting by relying on colloquies from earlier Board meetings that occurred between February 1981 and early January 1982, when the Board had different members. See Br. in Opp. 4-6, 21. Hunt does not bother to note that *after* these meetings he received a good evaluation, his probationary status was lifted and he got a raise. See Pet. 4. Hunt also ignores the fact that he *repeatedly* asked the Board to fire him and that one such request at the Board's November 1982 meeting prompted the Board's discussion of his job at its next meeting, on December 20. *Id.* at 4-5.

this far-fetched interpretation, and there is no reason for this Court to do so.[2]

B. The Board Did Not Approve Hunt's Discharge In May 1983. As we have shown, there is simply no evidence to support Hunt's assertion (Br. in Opp. 20) that the full Board "'officially sanctioned or ordered'" his discharge on December 20. Thus, the court of appeals concluded that "Mr. Hunt was terminated with the approval of Chairman Mooney and the Executive Director" in May

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[2] Hunt also argues (Br. in Opp. 22 n.13) that the judgment below could be affirmed on the procedural due process claim alone because of Personnel Director Gilmartin's "general[ ]" practice of not conducting pretermination hearings. Tr. 149. There are two flaws with this argument.

First, the evidence on this claim could not possibly support a judgment against the CHA. Gilmartin was the Personnel Director for only five months before Hunt's discharge. Tr. 188-89. Hunt cannot cite any evidence that any other CHA employee was terminated during this short time span. Similarly, there was no evidence of the number of discharged employees, if any, who were improperly denied pretermination hearings in 1983, and there was no evidence that the Board knew that any such employees did not have pretermination hearings. (Contrary to Hunt's brief (Br. in Opp. 22 n.13), there was no evidence that Gilmartin's discharge recommendations said anything about whether or not a pretermination hearing had been held, see Tr. 141). The only evidence that Hunt can point to (Br. in Opp. 22 n.13) is the number of CHA employees and the fact that *if* any other employee terminations had been recommended in 1983 Gilmartin would have reviewed them. That evidence is patently insufficient to satisfy Hunt's burden of establishing a "'persistent and widespread'" practice (*Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658, 691 (1978)) of which the Board "must have been aware" (*Praprotnik*, 485 U.S. at 130 (plurality opinion)).

Even if there were evidence to support the procedural due process claim, the judgment below would still have to be vacated if that were the only claim on which the judgment against the CHA could be sustained. The parties agreed at trial that if the jury found for Hunt only on the procedural due process claim, his actual damages would be limited to $1. Tr. 912-14.

1983. Pet. App. 6a. Moreover, the court went on to hold that "[t]here is *no realistic possibility* that the jury based the CHA's liability on the theory *that the CHA * * * approved the discharge.*" Pet. App. 17a (emphasis added). The record required the court to reach those conclusions: Gilmartin recommended Hunt's termination to Mooney alone, not the full Board (Pl. Ex. 39); shortly thereafter, Mooney sent Gilmartin a handwritten note that said, "*Mr. Beard and I agree* with your recommendation" (Pl. Ex. 40 (emphasis added); see also Tr. 142); and Gilmartin then sent Hunt a memo that said, "*The Chairman [Mooney] has approved* the recommendation of your supervisor and the Director of Personnel to terminate your employment" (Pl. Ex. 41) (emphasis added). Furthermore, while the record contains transcripts of many Board meetings, there is no evidence of a meeting at which the Board approved Hunt's discharge.

Undaunted by this evidence and by the Seventh Circuit's conclusions, Hunt now contends (Br. in Opp. 20) that the judgment against the CHA can be sustained on the theory that the "CHA's Board approved the discharge." The linchpin for this argument is the following testimony quoted in Hunt's brief:

> According to Gilmartin, "[t]he chairman [of CHA's Board] would * * * present to the board * * * all personnel actions * * * [including] terminations" for its approval.

Br. in Opp. 11 (ellipses in original) (quoting Tr. 141). Hunt, however, omitted one key word from Gilmartin's testimony. What Gilmartin actually said was:

> *Generally* the chairman would approve and then present to the board at their next meeting all personnel actions, whether they were employment or terminations or any other ones.

Tr. 141 (emphasis added). And whatever the "general" practice, Gilmartin made clear that *Hunt's* discharge was approved *only* by Mooney and Executive Director Beard, not by the full Board:

> Q: You recommended Mr. Hunt's termination both to Mr. Mooney, the chairman of CHA's board, and to Mr. Beard, the executive director; is that correct?

A: I believe I only recommended the termination to Mr. Mooney.

* * *

Q: And so at least in this case you got approval from both the chairman and at least through him from the executive director; is that correct?

A: It appears that way, yes.

Tr. 141-42. See also Pl. Ex. 40 (Mooney's note that "Mr. Beard and I agree with your recommendation").

In short, there was *uncontradicted* evidence that, as the Seventh Circuit concluded, Hunt "was terminated with the approval of Chairman Mooney and the Executive Director." Pet. App. 6a. There was absolutely no evidence that the other six Board members even knew of, let alone participated in, this decision, and thus, as the court below held, there was "no realistic possibility" that the jury based its verdict on the theory that Hunt now advances. Pet. App. 17a.

* * * * *

As we have demonstrated, it is clear from the record that (1) the Board did not order Hunt's discharge at its December 20, 1982 meeting, and (2) Hunt's discharge in May 1983 was approved by one Board member (Mooney), but not by the other six. There was simply no evidence that the entire Board ordered or approved Hunt's discharge. Thus, there is no doubt that the court of appeals imposed § 1983 liability on a local government agency based on the conduct of only one member of a collective policymaking body. In light of this Court's decisions since *Monell*, the Seventh Circuit's decision is truly inexplicable. The decision below so clearly conflicts with existing precedent—in an area of the law that is of profound importance to local governments across the country—that it should be reviewed.

II. THE CIRCUITS ARE DIVIDED ON WHETHER THE CONDUCT OF ONE MEMBER OF A POLICY-MAKING BOARD CAN SUBJECT A MUNICIPALITY TO § 1983 LIABILITY.

Largely by misreading the Eighth Circuit's decision in *Harris* v. *City of Pagedale*, 821 F.2d 499 (8th Cir.), *cert. denied*, 484 U.S. 986 (1987), Hunt argues that the Eighth Circuit has not really diverged from the Fourth, Fifth and Ninth Circuits on the issue whether the conduct of one member of a multi-member policymaking board is enough to establish § 1983 liability. Even if that were so, however, and the decision in *Harris* were consistent with the decisions by the other circuits, the Seventh Circuit's decision here is not, as we have shown. Thus, whatever the Eighth Circuit's holding in *Harris*, the decision below by itself establishes a split in the circuits and justifies granting the CHA's petition.[3]

In any event, Hunt's contention about the *Harris* decision is simply wrong. As Hunt notes, the cases that the CHA cited from the Fourth, Fifth and Ninth Circuits—*Collinson* v. *Gott*, 895 F.2d 994 (4th Cir. 1990), *Worsham* v. *City of Pasadena*, 881 F.2d 1336 (5th Cir. 1989), and *Lake Nacimiento Ranch Co.* v. *County of San Luis Obispo*, 841 F.2d 872 (9th Cir. 1987), *cert. denied*, 488 U.S. 827 (1988)—consider whether a municipality could be liable for "isolated acts" taken by its officials. Hunt concedes (Br. in Opp. 24) that those "isolated acts" cases hold that "the plaintiff must show that the acts were undertaken by those officials in the municipal corporation who have final policymaking authority—not, for example, by one member of a multi-member policymaking board." By contrast, Hunt argues (Br. in Opp. 26-29), the Eighth Circuit in *Harris* considered whether a municipality could be liable for a "municipal custom" of unlawful conduct. In Hunt's view,

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[3] Hunt is wrong in arguing (Br. in Opp. 15 n.7) that the decision below will be ignored by future courts. While the ruling cannot be cited as precedent in the Seventh Circuit pursuant to local rule, there is no such prohibition in other courts around the country. In this era of computer research, attorneys routinely scour Lexis and Westlaw for decisions that are not available elsewhere, and they do not hesitate to cite those cases.

the rule in such municipal custom cases is somehow different, and does not require culpable conduct by the final policymaker.

The distinction that Hunt draws between "isolated acts" cases, on the one hand, and "municipal custom" cases, on the other, is a distinction without a difference. In either type of case, the final policymaker must be responsible for the constitutional violation. To be sure, in municipal custom cases, the final policymaker need not formally approve the unconstitutional custom. However, for liability to be imposed, the policymaker—not some subset of that policymaker—must know of and acquiesce in that custom. As this Court has made clear, once the trial judge has identified "those officials or governmental bodies who speak with final policymaking authority * * *, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur, *or by acquiescence in a longstanding practice or custom* which constitutes the 'standard operating procedure' of the local governmental entity." *Jett* v. *Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989) (citation omitted; second emphasis added). Accord *Praprotnik*, 485 U.S. at 130 (plurality opinion) (a municipality can be liable when a "series of decisions by a subordinate official manifested a 'custom or usage'" of which a supervising policymaker "must have been aware").

In short, the rule is the same for "isolated acts" cases and "municipal custom" cases. Thus, the Eighth Circuit's decision in *Harris*—holding that individual members of the Board of Aldermen could establish a municipal custom and thereby subject the city to § 1983 liability, *Harris*, 821 F.2d at 506-07—is clearly at odds both with this Court's decisions and the decisions in *Collinson*, *Worsham* and *Lake Nacimiento Ranch*. Because the Seventh Circuit's decision here repeats the Eighth Circuit's error, this Court should grant the CHA's petition to resolve the split in the circuits, and to make clear that § 1983 liability cannot be imposed on a municipality because of the acts of one member of a policymaking body.[4]

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[4] Hunt also argues (Br. in Opp. 27 n.16) that the Eighth Circuit's holding that § 1983 liability could be based on the acts of individual

CONCLUSION

The petition for a writ of certiorari should be granted, and (1) the judgment below should be summarily reversed, or (2) the case should be set for briefing and argument.

Respectfully submitted.

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board members is a holding based on Missouri law, not on § 1983. The decision in *Harris*, however, belies this contention. The defendant there noted that under Missouri law, "the Board exists and can act only as a collective body." *Harris*, 821 F.2d at 506. (See also *Barton County Rock Asphalt Co.* v. *City of Fayette*, 155 S.W.2d 771, 774 (Mo. App. 1941) (because the Board of Aldermen was "the authorized governing body of the city" under state law, purchase orders signed by the Mayor and only one member of the Board were not enforceable against the city)). The plaintiff did not dispute this, but argued that those "statutory requirements * * * are not relevant," because she had "alleg[ed] a municipal custom." *Harris*, 821 F.2d at 506-07. The Eighth Circuit agreed with the plaintiff, upholding a § 1983 verdict based on the jury's finding that "a municipal custom had been established in this case by 'the collective or *individual* actions or inactions of the Board of Aldermen.'" *Id.* at 506 n.9 (emphasis added). This holding could not have been based on state law, but must have resulted from the court's view of § 1983.